Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-761

THE PHILADELPHIA HOUSING AUTHORITY,
Petitioner,

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, et al.,
Respondents.

[Additional Respondents listed inside cover]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ADDITIONAL RESPONDENTS.

HOUSING TASK FORCE OF THE URBAN COALITION,

BERNICE DEVINE,

ESTHER SIERRA MENDEZ,

JEAN THOMAS,

MABLE SMITH,

(Plaintiff-Appellees below)

CITY OF PHILADELPHIA,
FRANK RIZZO,
HILLEL LEVINSON,
JAMES H. J. TATE, and
FRED T. CORLETO,

MULTICON CONSTRUCTION CORP. and MULTICON PROPERTIES, INC.,

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

WHITMAN AREA IMPROVEMENT COUNCIL,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RUSSELL BYERS, and CARLA A. HILLS,

(Defendant-Appellants below)

[Addresses and special capacities listed in Appendix, pp. A86-A89]

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I. OPINIONS BELOW.

The Opinion of the District Court is reported at 425 F. Supp. 987 and is printed in the Appendix hereto, pp. A1-A82. The Opinion of the Court of Appeals is not yet officially reported but is printed in the Appendix hereto, pp. A86-A143.

II. JURISDICTION.

The Judgment of the Court of Appeals, of which review is sought, was entered on August 31, 1977 (Appendix at A144-A148. The Appendix is hereafter cited as "A —"). By Order dated September 26, 1977 (A149), the Court of Appeals denied the Petition of Appellees below (Respondents herein) for a panel rehearing. This Court has jurisdiction to review the judgment of the Court of Appeals upon Writ of Certiorari under 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED.

1. Whether a state agency may be held in violation of Section 804(a) of Title VIII of the Civil Rights Act of 1968, 42 U. S. C. § 3604(a), without a finding that the agency acted with discriminatory intent.

2. Whether a federal court may order a state agency, which has not been found to have committed a constitutional violation, affirmatively to build a particular housing project at a precise location in accordance with specific plans, when alternative remedies are available.

3. Whether a court may hold a state agency liable, under Title VIII of the Civil Rights Act of 1968, for the segregative effect of the termination of a proposed housing project, when there has been no proof and no finding by the trial court that the agency caused the termination.

4. Whether, in litigation in which the plaintiffs' equitable claims and a defendant's legal cross claims raise common issues of fact, the severance of the cross claims for trial after the non-jury trial of the equitable claims denies the defendant its constitutional right to a jury trial of the cross claims.

5. Whether, in a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, a court may disregard a representative plaintiff's retraction of testimony and invocation of the privilege against self-incrimination for perjury, when the individual was the only named plaintiff or class representative to testify and the only individual unequivocally to support the relief requested.

IV. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF CIVIL PROCEDURE INVOLVED.

1. United States Constitution.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to rules of common law.

2. Federal Statutes.

CIVIL RIGHTS ACT OF 1968, TITLE VIII, SECTION 804(a), 42 U. S. C. § 3604(a).

As made applicable by section 3603 of this title and except as exempted by section 3603(b) and 3607 of this title, it shall be unlawful—

(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a

dwelling to any person because of race, color, religion, sex, or national origin.

3. Federal Rules of Civil Procedure.

RULE 23.

SUBSECTIONS (a), (b)(2), (c)(2), and (c)(3).

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • •

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

• • •

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

• • •

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

RULE 38.

SUBSECTIONS (a), (b), AND (c).

JURY TRIAL OF RIGHT.

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the

other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

RULE 42(b).

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

V. STATEMENT OF THE CASE.

A. Factual Background.

This proceeding arises from a long history of controversy concerning proposals for a public housing project in an area of South Philadelphia known as Whitman Park. Both the District Court (A8-A32) and the Court of Appeals (A94-A109) have described the complex chronology of events leading to litigation.

Petitioner The Philadelphia Housing Authority ("PHA") is a local housing authority, created as an agency of the Commonwealth of Pennsylvania under the Pennsylvania Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. §§ 1541 *et seq.*, generally charged with the operation of public housing projects in the City of Philadelphia. In 1956, PHA began a series of hearings which, with other administrative and governmental proceedings, led to the choice of Whitman Park as the site for a proposed high-rise public housing project, to be called "Delaware Towers" (A8-A9, A97). Condemnation and acquisition of the land for the program began in 1959 (A9).

There soon developed substantial local concern over the prospect of high-rise public housing, and, in 1961, residents of the Whitman area formed a community organization called the "Whitman Area Improvement Council" ("WAIC") to oppose the project (A9). In view of the community opposition, and after further hearings and negotiation, the administrative and construction procedures for the project were changed to permit a low-rise "townhouse" type design (A11).[1]

Under the revised proposal, The Redevelopment Authority of Philadelphia ("RDA") was to acquire the Whit-

1. This change became possible under the so-called "Barrett Amendment", introduced by Representative William Barrett of South Philadelphia and adopted as Section 1007 of the Housing Act of 1964, P. L. 88-560, 78 Stat. 769.

man site for transfer to an approved developer under contracts (including an agreement with PHA) for construction of the project and conveyance back to PHA (A11). After development of a new site plan, sale of the property to RDA, and unsuccessful negotiations with one proposed contractor, the relevant agencies chose Multicon Construction Corp. and Multicon Properties, Inc. (collectively "Multicon") as the contractor to build the project (A11-A13).

In 1970, RDA conveyed the land to Multicon under appropriate contracts (A13-A14). A groundbreaking ceremony took place on December 16, 1970, and actual construction was scheduled to begin on March 23, 1971 (A15). Except for the building of a fence and some preliminary work, however, there was in fact no construction. From the commencement date, there followed picketing and demonstrations, administrative problems and various other disputes which led to a series of state court actions and the proceedings below (A15-A32).

In March, 1971, Multicon sued WAIC in the Court of Common Pleas of Philadelphia County to prevent interference with the project (*Multicon v. WAIC*, C. C. P., Phila. Cty., March Term, 1971, No. 4515), and shortly thereafter WAIC began an action against Multicon to stop construction (*WAIC v. Multicon*, C. C. P., Phila. Cty., July Term, 1971, No. 1187). Respondents brought the instant federal litigation in June, 1971, but the District Court stayed the proceedings pending the result of the state court cases (A3).

During the pendency of this litigation, the disputes, negotiations and administrative actions concerning the project continued (A15-A32). On April 28, 1972, RDA adopted a resolution authorizing action against Multicon upon PHA's representation of a default under the con-

tracts (A25-A26). PHA, however, made no such representation, and two months later RDA, by an additional resolution, itself declared Multicon in default (A26, A28, A31-A32).

At the same time, a third state court action began, with the City of Philadelphia bringing suit to stop the project and Multicon filing a substantial counterclaim for damages from interference with contractual relations (*City v. Multicon*, C. C. P., Phila. Cty., June Term, 1972, No. 3538) (A27, A29). This state court proceeding ended in December, 1972, by a settlement under which the City agreed to a compromise payment on Multicon's counterclaim (A32).

By the end of 1972, it appeared that the state court actions would not resolve the claims presented in the federal proceeding. The District Court, therefore, terminated the stay, and the parties proceeded with the litigation, leading to the decisions below (A3).

B. The Proceedings Below.

1. *Parties, Cross Claims, and Non-Jury Trial.*

The proceedings below began with a complaint, invoking the jurisdiction of the District Court under 28 U. S. C. §§ 1331 and 1343, against the Mayor and Managing Director of the City of Philadelphia and Multicon. The Court permitted WAIC to intervene as a party defendant, and Multicon joined PHA, RDA, and the United States Department of Housing and Urban Development ("HUD") as third party defendants. Upon respondents' motions, RDA, PHA, and HUD ultimately became principal defendants (A7-A8).

In May, 1975, the District Court certified the case as a class action, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of "all low income minority

persons residing in the City of Philadelphia who, by virtue of their race are unable to secure decent, safe, and sanitary housing, outside of areas of minority concentration and who would be eligible to reside in the Whitman Park Project" (A4).

With its Answer as a principal defendant, PHA filed a cross claim against Multicon demanding damages for breach of contract, and PHA timely demanded a trial by jury. Multicon responded with a counterclaim and cross claim for damages against PHA. Several months later, respondents moved to delete all claims for money damages, sever the trial of the cross claims and strike PHA's demand for a jury trial.

The District Court decided to allow the case first to proceed with a non-jury trial of the equitable claims. To this end, the Court granted the motions to dismiss the claims for damages, sever the cross claims and strike PHA's jury trial demand. While it did not enter a formal order as to the sequence of trials, the Court determined from the bench that the non-jury trial would proceed before the jury trial of the damage claims between PHA and Multicon (A137).

The non-jury trial began on October 7, 1975, included 57 days of testimony, and concluded on January 21, 1976. The jury trial of the cross claims has not yet been held.

2. *Post-Trial Proceedings Relating to Respondent Mrs. Jean Thomas.*

In late July, 1976, Respondent Jean Thomas, the only class representative and individual plaintiff to testify at trial, advised the District Court that she wished to change her testimony because portions of it had been untrue. After conferences with counsel, the Court met with Mrs. Thomas and scheduled a hearing on the matter at which time Mrs. Thomas would retain independent counsel.

At the hearing, Mrs. Thomas' attorney advised the Court that, because of possible self-incrimination that could arise from retraction of her testimony, Mrs. Thomas, on the advice of counsel, would exercise her constitutional privilege to remain silent. The following day, the District Court entered an order finding Mrs. Thomas entitled to invoke the privilege.

Shortly thereafter, PHA filed a motion to reopen or strike Mrs. Thomas' testimony. The District Court did not rule on the motion.

3. *The Decision of the District Court.*

On November 5, 1976, the District Court issued an 82 page Opinion, finding in favor of respondents on three legal theories, two of which, arising under Title VIII of the Civil Rights Act of 1968, applied to PHA (A1-A82).

The Court first determined that the affirmative duty imposed on HUD by Section 808(d)(5) of Title VIII, 42 U. S. C. § 3608(d)(5), also applied to state and local agencies and that the governmental defendants (PHA, RDA, The City of Philadelphia, and HUD) had failed to comply with this obligation, by not building the project (A47, A48-A66).

The District Court also held that a violation of Title VIII could arise from action having a segregative effect, without a finding of discriminatory intent. On this basis, the Court found the governmental defendants in violation of unspecified portions of Title VIII for having caused such an effect in "terminating" the project (A48, A66-A72).

On Respondents' statutory and constitutional claims of discriminatory intent, the Court's Opinion considered only the City of Philadelphia and WAIC and held only the City to have acted with improper racial motivation

(A48, A72-A75). The Court did not find any racially discriminatory intent, or any constitutional violation, on the part of PHA.

With respect to the remedy, the Opinion recognized the superiority of so-called "scattered site" public housing to conventional housing projects for achieving racial integration, but, for an unstated reason, the Court felt compelled to order the project's construction, stating:

> Although the Court is inclined to agree that "scattered site" housing may be more effective in accomplishing racial integration than a large public housing project, we are of the opinion that on the basis of this record the Court must order the building of the Whitman Park Townhouse Project as originally planned (A79).

Accordingly, the Court entered an Order (A83) directing the building of the project as originally planned, requiring PHA to submit a plan for the project's racial composition, enjoining interference with construction, and instructing PHA to submit plans for the tenanting of all public housing projects in Philadelphia to further integration.

With respect to Mrs. Jean Thomas' retraction of her testimony, the Opinion stated only that Mrs. Thomas had exercised her privilege to remain silent, and that her testimony was "unchanged" (A44). The Opinion made no reference to the controversy concerning PHA's demand for a jury trial.

4. *The Decision of the Court of Appeals.*

On August 31, 1977, the Court of Appeals entered an Opinion (A86-A143) and Judgment (A144-A148) affirming Paragraphs 1, 2, and 4 of the District Court's Order,

concerning the construction of the project, as to PHA and the other governmental defendants. The Court vacated Paragraph 3 of the Order, concerning the retenanting of all public housing projects in Philadelphia, as unwarranted and outside the scope of the litigation concerning Whitman Park.

In its discussion of Title VIII, the Court of Appeals reviewed the import of the portion of Section 804(a), 42 U. S. C. § 3604(a), proscribing the denial or making unavailable of a dwelling "because of race". It determined that a showing of segregative effect *prima facie* established a violation of this provision, without regard to discriminatory intent (A129-A135).[2] Quoting the District Court's statement concerning the "termination" of the project, the Court of Appeals found an unrebutted *prima facie* case of a Title VIII violation by PHA and the other governmental defendants (A135-A137). The Court affirmed the remedy requiring building of the project as "modest and conservative" (A136-A137).

The Opinion referred to the issues concerning Mrs. Jean Thomas and the jury trial of the cross claims only in footnotes and found neither sufficient for reversal of the District Court (A114, A137). With respect to Mrs. Thomas, the Opinion mentioned only respondents' standing to bring the action and the vigorous advocacy by their counsel (A114). While recognizing the importance of PHA's assertion of an unconstitutional denial of a trial by jury, the Court rejected the claim because it was not "persuaded that the essential elements of collateral estoppel have been met" (A137).

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2. Because of its holding concerning segregative effect, the Court of Appeals found it unnecessary to consider the District Court's extension of HUD's "affirmative duty" under Section 808 (d)(5) to state agencies such as PHA (A115, A128).

VI. REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. Review of the Decision Below by This Court Is Necessary to Resolve a Conflict Among the Circuits.

The decision of the Court of Appeals, as it relates to PHA, depends on the Court's holdings (1) that segregative effect, without regard to discriminatory intent, suffices to establish a violation of Section 804(a) of Title VIII of the Civil Rights Act of 1968, and (2) that an order affirmatively requiring a state agency to build a particular housing project at a specific location according to specific plans constitutes a permissible and appropriate remedy for such a statutory violation.

Both of these holdings, concerning important and far-reaching federal issues, are in direct conflict with the decisions of the Court of Appeals for the Second Circuit, and substantial conflict with decisions of the Courts of Appeals for the Sixth and Seventh Circuits.

In the Opinion below, the Court of Appeals states that its application of an "effect" standard to claims under Title VIII, without regard to discriminatory intent, "joins the ranks" of other circuits (A132). In fact, of the courts of appeals to consider this issue, only the Court of Appeals for the Eighth Circuit has fully concurred with this portion of the decision below. See *Smith v. Anchor Building Corporation*, 536 F. 2d 231 (8th Cir. 1976); *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied* 422 U. S. 1042 (1975). No federal court, including those in the Eighth Circuit, has yet imposed the extreme remedy, approved by the Court of Appeals in this case, of requiring a party affirmatively to build specific housing.

In *Boyd v. Lefrak Organization*, 509 F. 2d 1110 (2nd Cir. 1975), *cert. denied* 423 U. S. 896 (1975), the Court of Appeals for the Second Circuit, in direct conflict with the decision below, held that segregative effect alone could not establish a violation of Title VIII, including Section 804(a).[3]

With respect to remedies under Title VIII, *Boyd* confirmed that the Court of Appeals for the Second Circuit would not, in the absence of discriminatory intent, require the construction of housing. Citing the previous decisions in *Citizens Committee for Faraday Wood v. Lindsay*, 507 F. 2d 1065 (2d Cir. 1974), *cert. denied* 421 U. S. 948 (1975), and *Acevedo v. Nassau County*, 500 F. 2d 1078 (2d Cir. 1974), the Opinion in *Boyd* stated:

> [T]his Court will not impose even on the government an affirmative duty to construct low-income housing when the decision not to build is not racially motivated . . . 509 F. 2d at 1113.

Similarly, the Court of Appeals for the Sixth Circuit has, by necessary implication, rejected the type of relief imposed below as a remedy for a statutory violation based only on effect. In *Garrett v. City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974), the trial court had, on the basis of intentional discrimination, directed the construction of a certain number of housing units in a general geographic area (without specifying exact locations and plans as was done below). In considering the propriety of the remedy, the Court of Appeals held:

> The fundamental basis for the district court's disposition of this case lies in its finding of constitutional, not

3. A recent law review comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 *Harv. C. R.-C. L. L. Rev.* 128, 147-150 (1976), although arguing for a Title VIII "effect" standard, recognized the inescapable conflict on this issue between the Courts of Appeals for the Eighth and Second Circuits.

> statutory, violations by the defendants. Only deprivation of constitutional rights would justify the far-reaching remedial provisions of the court's orders. 503 F. 2d at 1247.

Plainly, the Court of Appeals in *Garrett* does not concur with the decision in this proceeding ordering the construction of a housing project solely on the basis of statutory violations.

Finally, the Opinion below refers to and relies on the decision, after remand from this Court, in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977) ("*Arlington Heights* II") as supporting the effect standard. *Arlington Heights* II, however, did not generally approve the effect concept for all cases. It rather found the standard potentially applicable to Title VIII claims, depending upon the circumstances of the case and four "critical factors"—including whether the plaintiff seeks to compel a defendant affirmatively to provide or build housing or "merely" to restrain from interference with housing. 558 F. 2d at 1290. Citing the Second Circuit decisions in *Acevedo v. Nassau County, supra*, and *Citizens Committee for Faraday Wood v. Lindsay, supra*, the *Arlington Heights* II Court found compelling reasons not to apply an effect standard to a Title VIII claim requesting the affirmative construction of housing units. 558 F. 2d at 1293.

In *Arlington Heights* II, the plaintiffs sought only restraint from interference. In this case, respondents sought, and the Courts below granted, an order directing that the defendants build specific housing. Under the facts of the two cases, the decision in *Arlington Heights* II presents more of a conflict than a concurrence with the decisions below.

B. This Case Presents the First Opportunity for This Court to Decide Whether Segregative Effect, Without Discriminatory Intent, Can Establish a Violation of Title VIII of the Civil Rights Act of 1968.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, — U. S. —, 50 L. Ed 2d 450 (1977), this Court, after reversing the application of an effect standard to constitutional claims, remanded for a determination of the case under Sections 804 and 817 of Title VIII, an issue the lower court had not considered. 50 L. Ed. 2d at 468. The decision thus left open the important question of whether, in the absence of discriminatory intent, segregative effect could establish a violation of the provisions of Title VIII of the Civil Rights Act of 1968 prohibiting the denial or making unavailable of a dwelling "because of race".

As discussed previously, this issue has given rise to a conflict among the circuits. Even the courts of appeals holding the effect standard applicable to Title VIII, however, including the Court of Appeals in this case, have found understandable difficulties in deciding that effect alone suffices to establish a violation of a statute which, by the use of the phrase "because of race" as its operative language, plainly suggests a requirement of intent. See A129; *Arlington Heights* II, 558 F. 2d at 1288.[4]

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4. The Opinion of the Court of Appeals states that, in debates on the statute, Senator Baker unsuccessfully tried to amend Title VIII to provide an intent standard for its violation (A131). In fact, Senator Baker's proposal was to extend the exemption for sales by an owner of a single family home, now in Section 803 (b)(1), 42 U. S. C. § 3603(b)(1), to include sales made through a broker, subject to the proviso that the owner could not use the exemption if he specified to the broker a preference or limitation based on race, color, religion, or national origin. 114 Cong. Rec. 5214-5215, 5218, 5219 (1968). The proposed amendment was unrelated to Section 804(a).

The only pronouncement by this Court on the subject strongly suggests that a showing of discriminatory intent is a prerequisite for a violation of Section 804(a). In *Warth v. Seldin*, 422 U. S. 490 (1975), this Court, in reviewing standing to raise certain housing claims, considered the import under Title VIII of a complaint challenging zoning practices claimed to have the "consequence of excluding members of racial or ethnic minority groups." 422 U. S. at 513 n. 21. Emphasizing the phrase "because of race" in Section 804(a), this Court found that the complaint did not allege a claim under that Section. The Opinion also stated that this Court intimated no view as to the result if the complaint had asserted "purposeful racial or ethnic discrimination." *Id.*

This portion of the *Warth* Opinion indicates that racial "consequence" will not establish a claim under Section 804(a) in the absence of a discriminatory purpose, and several lower courts have applied this concept in private, non-governmental Title VIII actions. See *e.g., Crumble v. Blumthal*, 549 F. 2d 462, 466 (7th Cir. 1977); *Haythe v. Decker Realty Co.*, 468 F. 2d 336, 338 (7th Cir. 1972); *Johnson v. Albritton*, 424 F. Supp. 456, 459 (M. D. La. 1977).[5]

The decision of the Court of Appeals below, applying the "effect" standard to Section 804(a) of Title VIII, reaches a conclusion contrary to that presented in the Opinion in *Warth v. Seldin, supra*, and the opinions of several lower courts. This case presents an opportunity for this Court firmly to establish the scope of Title VIII and the standard of proof necessary under Section 804(a).

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5. Decisions in private actions are of substantial significance to the development of Title VIII, since, as this Court has stated, "complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante v. Metropolitan Life Insurance Company*, 409 U. S. 205, 209 (1972).

C. The Decision Below Raises Important Issues as to the Remedial Powers of the Federal Courts.

The Court of Appeals decided that the statutory violations it had held to arise solely from a segregative effect justified an order requiring state agencies to build a housing project according to specific plans at a specific location. Although the Court's Opinion refers to the relief as "modest and conservative" (A136), the approval of this remedy is in conflict with decisions of the courts of appeals of other circuits and presents a substantial question as to the scope of equitable remedial powers of the federal courts.

Neither the Court of Appeals, the District Court, nor respondents (in a 177 page brief below) have referred to any precedent or authority for a remedy affirmatively directing the construction of specific housing units. Although the courts have rejected this type of relief in several cases, see *Boyd v. Lefrak Organizations, supra; Citizens Committee for Faraday Wood v. Lindsay, supra; Acevedo v. Nassau County, supra;* cf. *Arlington Heights* II, *supra,* no federal court, prior to the decisions below, had imposed such an order either on a governmental agency or a private party.

The issues raised by the remedy approved by the Court of Appeals are particularly compelling as applied to PHA in the circumstances of this case. The Courts below have, contrary to the mandates of this Court, assumed the governmental functions of PHA, a state agency,[6] and decided where and how Philadelphia's public housing will be built, without finding PHA to have

6. Although the Court of Appeals refers to PHA as the "City's" housing authority (A123) and a "municipal" agency (A127), PHA is, by the Pennsylvania Housing Authorities Law, an agency of the Commonwealth of Pennsylvania. 35 P. S. §§ 1550, 1544(a).

committed a constitutional violation or to have acted with discriminatory intent.

This Court has repeatedly held that such an intrusion into state or local government functions requires a constitutional violation by the governmental agency involved. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16, 28 (1971); *Milliken v. Bradley* (I), 418 U. S. 717, 738 (1974); *Rizzo v. Goode*, 423 U. S. 362, 377 (1976); *Hills v. Gautreaux*, 425 U. S. 284, 293 (1976); *Milliken v. Bradley*, (II), — U. S. — , 53 L. Ed. 2d 745, 757 (1977); *Dayton Board of Education v. Brinkman*, — U. S. — , 53 L. Ed. 2d 851, 862, 863 (1977). The holdings of the District Court and the Court of Appeals in this case against PHA are purely statutory, and PHA has not been found to have violated the Constitution.[7]

This Court has also made clear that a federal court must recognize and exercise special delicacy and restraint in the use of its equitable powers in connection with the activities and functions of state and local agencies. *Rizzo v. Goode, supra.* See also *Milliken v. Bradley* (II), — U. S. —, 53 L. Ed. 2d 745, 756 (1977); *Mayor v. Educational Equality League*, 415 U. S. 605, 615 (1974); *O'Shea v. Littleton*, 414 U. S. 488, 500 (1974). Although this concept does not easily lend itself to precise rules and standards, PHA submits that, in a case involving the extreme remedy of a mandatory injunction to build housing, issues of federalism at least require that substantial consideration be given to the availability of reasonable alternatives and the actual need for the relief ordered.

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7. The only governmental defendant that the Courts below found to have violated the Constitution, the City of Philadelphia, is also the only governmental defendant that would not have an active role in carrying out the planning, construction, and operation of the Whitman Park project.

Both of these factors confirm the impropriety of the remedy of requiring the building of the Whitman Park project. The District Court expressly recognized that so-called "scattered site" housing presented not only a reasonable, but a preferable, alternative to the project (A79).[8] Notwithstanding this conclusion, however, the District Court, without explanation, decided to order the project's construction.[9]

Similarly, there has been no reasonable showing of the need or desire for the use of the resources of the governmental agencies in this case, including PHA, to build this particular housing project. There has been substantial opposition to the project from the surrounding community, local government, and other state and local agencies. During 57 days of trial, only one person, Mrs. Jean Thomas, testified to an unequivocal desire to live in the project (and thus to have it built), and, as discussed below, Mrs. Thomas subsequently retracted her testimony. There is thus no credible evidence that anyone, including anyone eligible for public housing, wants the project built.

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8. The "scattered site" program involves the rehabilitation and use of existing structures to provide public housing tenants with individual dwelling units throughout a community, rather than a concentration of public housing in a single project. Unlike the remedy approved below, relief based on scattered site housing would not require an order for construction of a specific project and would obviate the need for the courts to assume the function of state and local agencies to decide where and how to build housing.

9. In *Arlington Heights* II (a case concerned with restraining interference with housing, not an affirmative order to build), the Court, after finding a violation of Title VIII, remanded the case for consideration of a number of matters, including the availability of alternative locations for the housing in question. 558 F. 2d at 1294-1296. The same result in this case would have required a reversal of the District Court, since appropriate, and preferable, alternatives to the Court's Order to build the project are available.

D. The Decision Below Severing Legal Cross Claims for Jury Trial After the Non-Jury Trial of Equitable Claims Raises Substantial Issues Concerning the Constitutional Right to Trial by Jury.

With its Answer as a principal defendant, PHA filed a cross claim against Multicon, the project developer, for money damages for breach of contract in failing to build the project—a claim at law giving rise to a constitutional right to a trial by jury.[10] U. S. Const., Amend. VII; *Curtis v. Loether*, 415 U. S. 189, 195-196 (1974); *Ross v. Bernhard*, 396 U. S. 531, 533 (1970). PHA timely demanded a jury trial, applicable to all issues including cross claims. F. R. Civ. P., Rules 38(b), 38(c).

The District Court prevented the initial determination by a jury of factual issues common to the equitable claims and legal cross claim, by severing the cross claim for trial after the non-jury trial of equitable issues. The Court of Appeals approved this procedure solely because it was "not persuaded that the essential elements of collateral estoppel have been met." (A137). PHA submits that the decisions of this Court do not permit circumvention of the constitutional right to a trial by jury on the basis of the formalities of doctrines such as collateral estoppel.

A trial court cannot constitutionally deny or curtail the right to a jury trial by the severance and prior trial of equitable claims, except to prevent irreparable harm in the most imperative circumstances. *Beacon Theatres v. Westover*, 359 U. S. 500 (1959); *Dairy Queen v. Wood*, 369 U. S. 469 (1962).[11] As Mr. Justice Black stated in

10. Multicon also filed a cross claim and counterclaim against PHA, demanding money damages for breach of a settlement agreement.

11. In *Beacon Theatres*, this Court stated that, in view of the flexible procedures of the Federal Rules of Civil Procedure, it could not foresee the imperative circumstances that might justify

the Opinion in *Beacon Theatres*, citing *Dimick v. Schiedt*, 293 U. S. 474, 486 (1935):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. 359 U. S. at 501.

The application of such a fundamental constitutional doctrine does not depend upon the technical prerequisites of collateral estoppel.[12] Both this Court and the courts of appeals have recognized the criterion for consideration of the propriety of a prior non-jury trial of equitable claims to be whether the litigation raises issues of fact common to the legal and equitable claims of the case. *Dairy Queen v. Wood, supra; Lee Pharmaceuticals v. Mishler*, 526 F. 2d 1115, 1117 (2d Cir. 1975); *Eli Lilly & Company v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1107 (5th Cir. 1972). In any such case, all claims must be tried in a single jury trial, or the legal claims tried before a jury *prior* to the trial of the equitable claims.

Resolution of respondents' equitable claims and PHA's cross claims in this case necessarily requires deter-

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11. (Cont'd.)
this exception. 350 U. S. at 510-511. In the proceedings below, the decisions relating to the jury and non-jury trials did not involve any suggestion of irreparable harm or "imperative" circumstances, and respondents have not presented any contention to the contrary.

12. Although possible collateral estoppel is not determinative of the jury trial issue, it is likely that the doctrine would apply to the trial of the cross claims. The "termination", or non-construction, of the project, which will be the principal issue on the breach of contract claims, was a major controverted issue in the proceedings below (in which PHA and Multicon were adverse parties) on which the District Court made numerous findings of fact. See *Sea-Land Services v. Gaudet*, 414 U. S. 573, 593 (1974); *Cromwell v. County of Sac*, 94 U. S. 351, 353 (1877).

mination of common issues of fact. Respondents assert liability under Title VIII against PHA and the other governmental defendants for the effect of not building the Whitman Project. PHA's cross claim alleges contract liability for damages on the part of Multicon for failure to build. No factual decision on either claim is possible without findings as to the party responsible for non-construction.

The District Court in fact made such findings and, in so doing, severely curtailed, or made effectively impossible, a jury trial of PHA's cross claim. The District Court's Opinion contains a 24 page exposition of findings of fact with extensive references to Multicon and the events leading to the non-construction of the project (A8-A32), and the Court of Appeals substantially confirmed that presentation (A94-A109). Because of these decisions, made without a jury, PHA's cross claims face the complete defense of impossibility of performance in that the courts have already decided that the governmental defendants in this case, not Multicon, terminated the project and prevented Multicon from fulfilling its contractual obligations. See *e.g. Restatement, Contracts* §§ 454-457.

PHA submits that such a result, based entirely on the formalities of collateral estoppel, does not comport with the mandate of the seventh amendment and should be reviewed by this Court.[13]

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13. In reaching its decision on this issue, the Court of Appeals relied on *Moore v. Townsend*, 525 F. 2d 482 (7th Cir. 1975). In *Moore*, however, the decision permitting the severance of cross claims for a later trial was based not on considerations of collateral estoppel, but simply on the fact that "none of the questions involved" in the cross claims were involved in the equitable claims, and that "none had been determined", 525 F. 2d at 486, a situation certainly not present in this case.

E. The Circumstances Relating to the Post-Trial Disclosures of Mrs. Jean Thomas Raise Important Questions Concerning the Implications of the Invocation of the Privilege Against Self-Incrimination in a Civil Class Action.

Approximately five months after trial, Mrs. Jean Thomas, the only individual plaintiff and the only class representative to testify at trial, advised the District Court that portions of her testimony had been untrue. After several conferences, Mrs. Thomas, on the advice of new and independent counsel, invoked her privilege against self-incrimination and refused to say anything further about her disclosure or her prior testimony.

The District Court's Opinion made no reference to these developments, except to state that because of Mrs. Thomas' silence under her fifth amendment privilege her testimony was "unchanged" (A44).[14] The Court of Appeals did not question this conclusion and referred to the matter only briefly in the context of standing and the vigorous prosecution of the action by respondents' counsel (A114). PHA submits that the issues raised by Mrs. Thomas' actions are of substantially more importance and present far-reaching questions concerning the use of the fifth amendment privilege in civil cases.

First, Mrs. Thomas' disclosure and subsequent silence did not leave her testimony "unchanged". Although the invocation of the privilege against self-incrimination cannot establish an inference of guilt in a criminal case, *Griffin v. California*, 380 U. S. 609 (1965), a failure or refusal to speak in a civil proceeding does give rise to an inference

14. Shortly after the hearing concerning Mrs. Thomas' disclosures, PHA filed a motion to strike or reopen testimony, and again raised the issue in a motion for a new trial. The District Court denied the motion for a new trial without comment (A84-A85) and did not rule on the motion to strike or reopen testimony.

that the testimony, if given, would have been adverse to the witness. *Baxter v. Palmigiano,* 425 U. S. 308, 319 (1976).[15] Since, as all parties have recognized, Mrs. Thomas invoked her privilege to avoid self-incrimination for perjury, her silence established an inference that she would have contradicted her previous testimony under oath, and that her testimony at trial was untrue.

The significance of this inferred perjury to the proceedings below is substantial.[16] At trial, Mrs. Thomas expressed her desire to live in the Whitman Park Project (and thus to have it built), and she was the only witness unequivocally so to testify. With her testimony inferred to have been false, there is no credible evidence supporting any need or desire for the project's construction. The importance of such circumstances to a case involving a mandatory injunction requiring a state agency to build the project cannot be dismissed solely by reference to standing and the vigorous advocacy of counsel.

In addition, this litigation proceeded as a class action, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of thousands of persons, with Mrs. Thomas as a named class representative and the only such

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15. Both this Court and the lower federal courts have confirmed and applied such an adverse inference under circumstances involving consequences to the witness far more serious than any at issue here. See *Baxter v. Palmigiano, supra* (prison discipline); *Brown v. United States,* 356 U. S. 148 (1958) (contempt); *Chavez-Raya v. Immigration and Naturalization Service,* 519 F. 2d 397 (7th Cir. 1975) (deportation); *N. Sims Organ & Co. v. Securities and Exchange Commission,* 293 F. 2d 78 (2d Cir. 1961), *cert. denied* 368 U. S. 968 (1962) (license revocation).

16. This Court has recognized the importance in civil actions of inferences from silence and found that a prohibition of an adverse inference "derogates rather than improves the chances for accurate decisions". *Baxter v. Palmigiano, supra* at 319. As Mr. Justice Brandeis stated in *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 153-154 (1923), "Silence is often evidence of the most persuasive character."

representative to testify at trial. Rule 23(a)(4) requires that, as a class representative, Mrs. Thomas "fairly and adequately protect the interests of the class". Because of the binding effect of class action adjudications, F. R. Civ. P., Rule 23(c)(3), fair and adequate representation is not only a prerequisite of the Rule, but a constitutional mandate of due process. *Hansberry v. Lee*, 311 U. S. 32 (1940). See also *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F. 2d 340, 346 (D. C. Cir. 1976), *cert. denied*, — U. S. —, 97 S. Ct. 2674 (1977).[17]

At a minimum, adequate class representation requires that the representative's interest coincide and not conflict with the interests of the class, *Sosna v. Iowa*, 419 U. S. 393, 403 (1975). The post-trial developments relating to Mrs. Thomas raise substantial questions concerning her compliance with this standard. The issue is not, as the Court of Appeals suggested, counsel's vigor in supporting the position Mrs. Thomas asserted at trial, but whether the presentation and advocacy of that position on the basis of testimony now inferred to be false properly represented a class which is conclusively bound by the results of the representation.

Stated differently, the inference arising from Mrs. Thomas' post-trial disclosure and subsequent invocation of her fifth amendment privilege raises the question of whether, in a federal class action, perjury is "fair and adequate" representation.

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17. This is particularly important in a class action under Rule 23(b)(2), in which the absent class members are conclusively bound by the result, but are not entitled to any notice of the proceedings and do not have an opportunity, available in actions under Rule 23(b)(3), to "opt out" of the litigation. F. R. Civ. P., Rules 23(c)(2), 23(c)(3). See *Wetzel v. Liberty Mutual Insurance Company*, 508 F. 2d 239 (3d Cir. 1975), *cert. denied*, 421 U. S. 963 (1976); 3B *Moore's Federal Practice* ¶ 23.60 at 23-1202.

VII. CONCLUSION.

For the foregoing reasons, Petitioner The Philadelphia Housing Authority respectfully submits that this Petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OP PENNSYLVANIA.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1575

RESIDENT ADVISORY BOARD, et al.

v.

FRANK L. RIZZO, et al.

Memorandum and Order.

November 5, 1976.

BRODERICK, *J.*

The plaintiffs in this action have brought suit alleging that various defendants have violated the Civil Rights Acts of 1866 and 1871, 42 U. S. C. §§ 1981, 1982, 1983, 1985 and 1986; the Civil Rights Act of 1964, 42 U. S. C. § 2000(d); Title VIII of the Civil Rights Act of 1968, 42 U. S. C. § 3601 *et seq.*, as well as the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. The plaintiffs commenced this action in 1971 seeking both injunctive relief and damages against the defendants in connection with their actions or inactions in

the proposed construction of a low income public housing project in a White residential area. The Whitman Park Townhouse Project was to be built in South Philadelphia on a site bounded by Porter Street to the north, Oregon Avenue to the south, Front Street to the east, and midway between Second Street and Hancock on the west. (Exhibit P-168). Plaintiffs contend that the failure to build this proposed project violates their rights under the statutes and constitutional amendments enumerated above. Prior to trial, the plaintiffs, with the permission of the Court, dropped all damage claims against the defendants and now seek only injunctive relief. The plaintiffs are asking this Court to enter a sweeping decree which would order the defendants, their officers, agents, employees and any and all other persons acting in concert or participation with them to take all necessary steps to build the Whitman Park Townhouse Project as planned and establish an affirmative program to insure that the occupancy of the Whitman Park Townhouse Project is racially integrated; declare null and void any and all agreements and resolutions which are dysfunctional to the completion of the Whitman Park Townhouse Project; permanently enjoin the Department of Housing and Urban Development (HUD) from dissipating any funds now held in reserve for the purpose of constructing the Whitman Park Townhouse Project; order the City of Philadelphia (City), the Redevelopment Authority of Philadelphia (RDA), the Philadelphia Housing Authority (PHA), the Philadelphia City Council, and HUD to appropriate and/or spend any necessary funds to complete the original Whitman Park Townhouse Project, made necessary because of the delay resulting from the defendants' respective unlawful acts; and order the defendants City, RDA, PHA and HUD, in cooperation with the plaintiffs, to present to this Court a

comprehensive plan which will remedy the racially segregated public housing system in Philadelphia by increasing as rapidly as possible the supply of housing units in non-racially impacted areas of the City so as to create equal housing opportunities for low income persons. This plan would, according to the plaintiffs, include a broad range of alternatives available to the City for public housing. Finally, the plaintiffs seek from this Court an order directing the defendants to reimburse plaintiffs for all costs and attorneys' fees arising as a direct result of this litigation.

This litigation, which was filed in 1971, has been protracted and vigorously contested by all parties and encompasses a complex and prolonged procedural history. Shortly after the suit was filed, this litigation was stayed by consent of counsel to await the outcome of a suit filed by the Whitman Area Improvement Council (WAIC) in the Philadelphia Court of Common Pleas.[1] In that lawsuit WAIC attempted, unsuccessfully, to halt construction of the Whitman Park Townhouse Project through the judicial process. After a trial in state court which lasted from August 4, 1971 through September 6, 1971, the case was dismissed as moot on March 20, 1974. In 1972, after it became apparent that the Common Pleas Court suit would not dispose of the issues raised in this Federal action, the parties began a discovery process which required constant intervention by this Court. The record in this case now contains over 450 docket entries. The parties, during the course of this litigation, participated in protracted discussions in an effort to bring about settlement of this litigation, and although it was generally conceded that additional housing was badly needed in Philadelphia, a settlement never materialized. The non-jury trial of this

1. WAIC, et al. v. Multicon, et al., No. 1187, July Term, 1971 C. P. Co.

case commenced on October 7, 1975 and consumed 57 days, finally ending on January 21, 1976. All parties have now filed with the Court proposed findings of fact and conclusions of law with briefs in support thereof, and the matter is now ready for decision.

The Parties.

The plaintiffs in this case are individuals claiming to represent a class defined as "all low income minority persons residing in the City of Philadelphia who, by virtue of their race, are unable to secure decent, safe and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman Park Townhouse Project." [2] The only individual named as a plaintiff in the plaintiff's Corrected Second Amended and Supplemental Complaint to testify at trial was Ms. Jean Thomas. Ms. Thomas resides in a scattered site house owned by PHA at 5024 Brown Street in Philadelphia, a predominantly Black area of the City. (N. T. 43-77, 43-78). Prior to moving to the Brown Street address in June of 1971, Ms. Thomas lived at 3855 Mount Vernon Street in Philadelphia, a scattered site house owned by PHA and located in a predominantly Black neighborhood. (N. T. 43-77). Ms. Thomas moved from her home on Mount Vernon Street because of the bad condition of the house.[3] The most serious problem in this house was that water constantly leaked into her basement up to the fifth or sixth step leading to the first floor. This basement water would become stagnant, creating a health hazard for her and her

2. The case was certified by the Court as a class action on behalf of the above defined class on May 8, 1975.

3. Ms. Thomas testified that PHA told her that her house on Mount Vernon Street was unfit for human habitation in 1968, after she had a serious problem with water in her basement. (N. T. 43-95, 43-96). Apparently, the house had been constructed over a creek. (N. T. 43-96, 43-102).

family. (N. T. 43-77). Her present scattered site house also has water in its basement which has destroyed all her personal belongings stored in the basement. (N. T. 43-78, 43-79). In addition, the electric wiring is in poor repair and Ms. Thomas has difficulty heating her second floor front bedroom. (N. T. 43-78). As a result of these problems, Ms. Thomas asked PHA to find her another house in 1971 and was placed by PHA on their waiting list. (N. T. 43-79, 43-83). Ms. Thomas testified that she "would have loved" to live in the proposed Whitman Park Townhouse Project. (N. T. 43-80).[4]

Additionally, there are two organizational plaintiffs in the lawsuit, the Resident Advisory Board (RAB) and the Housing Task Force of the Urban Coalition (Housing Task Force). Both organizations have sued the defendants on behalf of themselves and their members. Ms. Nellie Reynolds is the president and chairperson of RAB and testified on behalf of RAB. (N. T. 43-6). RAB is an organization whose membership includes all those currently living in public housing in the City of Philadelphia. (N. T. 43-6, 43-8, 43-9, 43-10). Currently, there are approximately 120,000 public housing tenants in the City of Philadelphia. (N. T. 43-6). RAB and PHA have signed a memorandum of understanding which enables RAB to effectively advocate the position of all tenants of public housing and to act as a liaison between the tenants, PHA and HUD.[5] (N. T. 43-8, 43-11, 43-12). All tenants of

4. Ms. Thomas never requested a transfer to any particular location, but testified that she wants to live anywhere where it is decent for her and her family. (N. T. 43-83, 43-86, 43-97). Ms. Thomas stated that the only PHA procedure that she was aware of for obtaining other housing was to request a transfer. PHA would then try to find a suitable house for the applicant.

5. RAB is concerned with public tenant problems in connection with admission, PHA policy changes, security and police protection, maintenance and the overall condition of public housing in Philadelphia. (N. T. 43-11, 43-12).

public housing in Philadelphia are eligible to become members of the Board. (N. T. 43-8). Also, those who are eligible to become tenants of public housing, regardless of whether they have applied for and are on the waiting list for public housing, are eligible to become members of RAB.[6] (N. T. 43-10). Although people on the waiting list have no vote in RAB elections, RAB has undertaken to represent those on the public housing waiting list. (N. T. 43-65, 43-66). Ms. Reynolds personally has lived in public housing for 35 years and she currently lives in the Johnson Homes project at 2630-D Norris Drive, Philadelphia. (N. T. 43-6, 43-32). Ms. Reynolds testified that she felt that the Johnson Homes project needed modernizing and that if Whitman were built as proposed, she would consider asking to transfer to that project. (N. T. 43-34, 43-35, 43-75, 43-76).

The Housing Task Force is a semiautonomous arm of the Urban Coalition. (N. T. 44-101). The Urban Coalition is described as a partnership of business, labor and community people who have joined together for the purpose of bringing the varied resources of the community together to attack various urban ills, particularly those of minority groups living in the inner city. (N. T. 44-100). The membership of the Housing Task Force is chosen by the Executive Committee of the Board of Directors of the Urban Coalition and the Housing Task Force is empowered to make decisions in connection with housing in Philadelphia without the approval of the Urban Coalition. (N. T. 44-101). There is no requirement that members of the Housing Task Force be either tenants of PHA or eligible for public housing. (N. T. 44-126, 44-127). The Housing Task Force is concerned mainly with improving housing

6. Each public housing development elects a representative, and an alternate to a committee, which committee elects the Board. (N. T. 43-6). The Board is 95% Black. (N. T. 43-11).

conditions for lower income people, and is therefore concerned with the availability of public housing for those low income groups. (N. T. 44-106, 44-107, 44-111). The Housing Task Force is also concerned with bringing industrialized housing to Philadelphia and asked the Urban Coalition to become involved in industrial housing. (N. T. 44-111). Therefore, at the time that plans were submitted for public housing on the Whitman site, the Urban Coalition, together with RAB, submitted a proposal to locate industrial housing on the site. The combined RAB and Housing Task Force proposal was rejected. (N. T. 44-111, 44-112). At the time this lawsuit was filed in 1971, of the fifteen members of the Housing Task Force, three members were living in public housing or eligible therefore. (N. T. 44-103). Another newer member of the Housing Task Force was a tenant in public housing until 1975. (N. T. 44-105). As of this date, at least one member of the Housing Task Force is eligible to live in public housing. (N. T. 44-129, 44-132).

The original defendants who were joined when this suit was filed were the then Mayor James H. J. Tate, the City Managing Director Fred Corleto, Multicon Properties, Inc. and Multicon Construction Corporation,[7] who were to be the builders of the Whitman Park Townhouse Project. The local community group opposing the Whitman project, WAIC, was permitted, pursuant to their motion, to intervene as a defendant in the lawsuit. WAIC then joined as third party defendants PHA, RDA and HUD. PHA is created by state statute [8] and is composed of five members, two of whom are chosen by the Mayor of Philadelphia, two by the Controller of the City of Philadelphia, with the

7. Hereinafter, Multicon Properties, Inc. and Multicon Construction Corporation will be referred to jointly as Multicon.

8. 35 P. S. § 1541 *et seq.*

four appointed members selecting the fifth.[9] The members serve for staggered five year terms. (N. T. 1-33, 1-34). RDA is also a creature of state statute [10] and all its members are appointed by the Mayor of Philadelphia. (N. T. 1-70).[11]

In 1972, the new Mayor, Frank Rizzo, and the new Managing Director, Hillel Levinson, were joined individually as defendants and were substituted in their official capacities for their predecessors in office, Mayor Tate and Managing Director Corleto. The City of Philadelphia was later added as a defendant, as was RDA. Finally, after extensive discovery had been conducted, PHA and HUD were joined by the plaintiffs as defendants. The Philadelphia City Council was joined as a defendant in the event the Council was needed to insure that the Court could render appropriate relief.

Facts.

On June 4, 1956, PHA conducted a public hearing at which various sites were considered for the development of low income housing projects. Citizens and groups from the Whitman area were in attendance at this PHA hearing, some nineteen of which testified and expressed their views on public housing. (N. T. 2-22). After the hearing, PHA passed a resolution selecting a site at Front and Oregon in Philadelphia for the Whitman project. (N. T. 1-81). Also in 1956, the Whitman site was approved as a public housing site by the Philadelphia City Planning Commission. (N. T. 1-84). On February 18, 1957, HUD gave tentative approval to the Whitman site for the development of a conventional public housing project. (N. T. 1-84). An

9. 35 P. S. § 1545(b)(1).

10. 35 P. S. § 1701 *et seq.*

11. 35 P. S. § 1705.

annual contributions contract was executed by HUD on December 6, 1957, in the amount of $8,607,793, approving a development program for Whitman of 476 units and authorizing PHA to begin planning the Whitman project. (N. T. 1-85). Drawings for a high rise public housing project at the Whitman site were submitted to HUD by PHA and were approved by HUD on August 28, 1959. (N. T. 1-85). Condemnation and acquisition of the site by PHA took place during 1959 and 1960, culminating with the award of demolition contracts on June 26, 1960. This action had the effect of removing some of the Black families who lived on the Whitman site. (N. T. 31-147, 31-148).

On January 12, 1961, a second public hearing was conducted by PHA for the purpose of adding two small parcels of land to the Whitman site, which addition was approved by PHA. (N. T. 1-85, 2-22). Local opposition developed in reaction to the placing of high rise public housing in Whitman and WAIC was formed to oppose the Whitman project as planned. (N. T. 1-85, 2-23).

On October 27, 1963, RDA executed an application to establish the Whitman Urban Renewal Area. (N. T. 2-10). The application sought a federal grant of $3,311,024 and a temporary loan of $5,545,524 (totaling $8,856,548) to carry on the land acquisition, relocation of site residents, demolition and site clearance, site preparation, and rehabilitation or conservation required for the proposed Whitman Urban Renewal Area. (N. T. 2-10, 2-11). The plan included clearing 130 homes, none of which were at the Whitman public housing site, and rehabilitating 2,500 structures. (N. T. 2-11). The Whitman Urban Renewal Plan, dated October 23, 1963, which included the previously established Whitman public housing site, contained no height limitation for public housing

within the area. (N. T. 2-11, 2-12).[12] The land use map for the Whitman Urban Renewal Area provides for public housing as the land use for the Whitman site and is the only site in the Whitman Urban Renewal Area designated for public housing. (N. T. 2-13). In 1963, the estimated racial composition of the Whitman Urban Renewal Area was 3,373 White families and 94 non-White families, 21 of which were to be displaced by the urban renewal. (N. T. 2-13). The total amount of all governmental funds expended through RDA in the Whitman Urban Renewal Area from 1963 through April 30, 1975 has been $11,178,210.43; of this amount $6,682,686.92 has constituted federal funds from HUD. (N. T. 2-21). RDA, with federal funds from HUD and from other sources, condemned and acquired a total of 101 properties and parcels of land in the Whitman Urban Renewal Area at a total estimated cost of $1,550,075. Between 1969 and 1973, 109 new homes were privately developed and sold for between $25,000 and $30,000, all of which were eligible for FHA-insured mortgages. (N. T. 2-16). There was no opposition by WAIC to these privately developed homes. (N. T. 2-20). From January 1, 1966 until May 1, 1975, Whitman residents, through RDA and with the aid of federal funds, have obtained $2,718,278 in loans and grants to rehabilitate their homes. (N. T. 2-20). A total of 1,123 households have received funds from this program. Over one-fourth of all the households in the Whitman area have benefited from the grant and loan program initiated by RDA. (N. T. 2-21). Further, urban renewal activities in the area have included a wide range of activities benefiting the Whitman area. (N. T. 2-20).

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12. After passage of the Barrett Amendment in 1964, referred to herein, the plan was amended to provide for low-rise public housing dwellings. (N. T. 2-12).

In 1964, after opposition by WAIC had developed to the high-rise design of the proposed Whitman project, a special Act of Congress was passed, known as the Barrett Amendment. (N. T. 1-85, 20-11).[13] Pursuant to the Barrett Amendment, the design of the proposed Whitman project was changed from high-rise to low-rise construction and RDA purchased the Whitman site land from PHA for $1,217,679.59 with the understanding that the land would be conveyed by RDA to a developer for construction, and finally deeded back to PHA for management by it as a low-rise public housing project. (N. T. 1-85, 1-86, 5-58, 5-59, 20-11). The sale of the land to RDA resulted in a writedown of the cost of the land and a change in the zoning of the Whitman site within the Urban Renewal Area to permit low-rise public housing. (N. T. 5-59). Such a change in the urban renewal plan was approved by City Council on September 2, 1964. (N. T. 1-85).[14] In May of 1967, City Council passed an ordinance approving the purchase of the land from PHA. (N. T. 1-87). In late 1967, Hartsville Construction Company was chosen as a developer to build 114 units on the Whitman site. (N. T. 1-87, 5-18). WAIC opposed certain aspects of the Hartsville plan and Hartsville refused to execute the contract of sale tendered to it on May 2, 1969. (N. T. 1-87, 5-18). Because of the opposition by WAIC to the Hartsville plan, a decision was made to look for a new developer which would develop its own plan and not use the old Hartsville plans. (N. T. 5-19). Also, because the Hartsville plans were not to be used, a "turnkey" developer was obtained.

13. The Barrett Amendment is Section 1007 of the Housing and Urban Development Act of 1964. The Amendment was introduced by the late South Philadelphia Congressman, William Barrett.

14. The cost of the writedown by RDA was absorbed in the urban renewal programs of the City, with the aid of federal subsidies from HUD. (N. T. 1-86, 5-59).

(N. T. 5-21). A turnkey developer differed from a conventional housing developer in that the turnkey developer would purchase the land, hire the architect to design the project, produce the drawing, set a cost for his project and then submit his proposal to the Housing Authority. (N. T. 5-22). The Housing Authority, if it decided to accept a turnkey developer's proposal, would, after appropriate public hearings and approvals, sign a contract with the turnkey developer and HUD, which specified that the turnkey developer would build the project and upon completion turn it over to the Housing Authority for the agreed upon purchase price. The Housing Authority would manage the project and HUD would provide the necessary subsidies. (N. T. 5-22, 5-23).

A HUD Equal Opportunity staff review of the Whitman site was conducted and approval of the site for low income public housing was recommended on June 4, 1968. The Whitman site was described as being located in a predominantly all-White area, condusive in all respects to Equal Opportunity Housing. (N. T. 1-87). Thereafter, HUD approved the Whitman site. (N. T. 1-87). The next year HUD established the Whitman project as a "balance" for the Morton Addition, a project located in a Black area of Philadelphia. (N. T. 1-88).[15] The Morton Addition has been completed and is now occupied. (N. T. 2-4).

During the latter part of 1969, PHA and RDA advertised for turnkey developers for the Whitman site pursuant to all applicable regulations. Twelve developers responded, and on April 28, 1970, PHA chose Multicon as the developer, which choice was approved by HUD on

15. The "balance" concept was part of HUD's site selection criteria pursuant to Title VI of the 1964 Civil Rights Act, 42 U. S. C. § 2000(d). (N. T. 1-88). HUD Equal Opportunity review of the Morton Addition recommended only a qualified approval of the Morton project conditioned upon completion of the Whitman project. (N. T. 2-4).

May 20, 1968. (N. T. 2-7, 2-8).[16] The Multicon proposal was considered superior to all other proposals because it maintained existing street patterns and the housing was of the same design as the other houses in the Whitman area. (N. T. 5-25, 5-26, 5-27, 5-28).[17] The Whitman Park Townhouse Project was unique in design for public housing because each house was designed with street frontage and a separate entrance and could be individually plotted on a separate building lot. (N. T. 5-41, 5-47, 5-62, 5-63, 5-64). This design was in anticipation of a federal program called Turnkey III, which called for a lease-purchase agreement pursuant to which the public housing tenant could eventually become the owner of his own home. (N. T. 5-46, 5-48).[18]

On July 14, 1970, RDA and Multicon entered into an agreement of sale to enable Multicon to obtain the land at Front and Oregon and build the Whitman Park Townhouse Project. On October 27, 1970, Mayor Tate signed an ordinance which had been passed by City Council approving Multicon as the developer of the project. On October 29, 1970, based upon appropriate HUD approval of the project, PHA and Multicon entered into an agreement of sale whereby Multicon was to construct 120 townhouses on the Whitman site. (N. T. 2-8, 2-9, 2-10). On

16. By RDA Board resolution, a disposal price of $115,000 was set on the land, which represented the reduced value of the land for the use scheduled in the urban renewal plan. (N. T. 2-8).

17. The Whitman Park Townhouse Project was not an apartment style design but was designed as a two story row house development. (N. T. 5-28, 5-38).

18. Originally, of course, PHA would own and operate the Whitman Park Townhouse Project. The common areas which PHA would retain control of after the homes were purchased by public housing tenants were kept to a minimum. (N. T. 5-48). Tenants would take on maintenance responsibilities to build up "sweat equity" to enable them to make a down payment and eventually to own their homes.

October 30, 1970, RDA conveyed title to the Whitman Park Townhouse Project site to Multicon.

Prior to the signing of the contracts with Multicon, WAIC, which was designated as the local citizen participation unit, for the Whitman Urban Renewal Area, was involved in numerous meetings and correspondence with RDA, PHA and Multicon officials. (N. T. 2-22, 2-25, 2-26). On June 2, 1970, a meeting was held in the Whitman community and was attended by officials from RDA, PHA, Multicon and the Mayor's office. (N. T. 5-60). The meeting was held to give WAIC an opportunity to closely review the Multicon plans for the Whitman Park Townhouse Project. (N. T. 5-61). WAIC made several suggestions in connection with the building materials to be used in the project and fire safety for the completed townhouses. (N. T. 2-26, 5-65, 5-66, 5-68). The suggestions were accepted by those officials in attendance at the meeting and, after investigation, appropriate changes were made in the Whitman Park Townhouse Project plans. (N. T. 5-67, 5-68). Also, the home ownership potential and the advantages thereof of a public housing development under Turnkey III were explained to WAIC. (N. T. 5-70, 5-71, 5-85). WAIC officials stated after the June 2, 1970 meeting that the Whitman Park Townhouse Project plans "look excellent", that WAIC was "very impressed with the plans" and that WAIC felt that the houses would be "an asset to our community." (N. T. 2-26, 2-27).

On January 28, 1971, the president of WAIC, Alice Moore, wrote to RDA in connection with the Whitman Park Townhouse Project: "We . . . do not feel that all of our questions have been thoroughly answered." (N. T. 2-32). On March 22, 1971, two PHA representatives attended a WAIC meeting to answer community questions about the project. At the same meeting, Fred Druding

was elected as the new president of WAIC and a decision was made to demonstrate the next morning in opposition to the Whitman Park Townhouse Project. (N. T. 2-33).

Although a groundbreaking ceremony was conducted on December 16, 1970, actual construction did not commence until March of 1971. At 7:30 a.m. on March 23, 1971, approximately thirty women entered the Whitman site and gathered around a bulldozer and backhoe, blocking the operations of the contractor and refusing to leave the area when requested to do so. (N. T. 2-33, 2-34). On that same day, demonstrators at the Whitman site blocked a truck attempting to make a delivery to the Whitman Park Townhouse Project. (N. T. 2-34). Again, on March 25, 1971, demonstrators refused to permit a bulldozer to be operated on the Whitman site. (N. T. 2-34). As a result of these activities, Multicon filed a complaint in the Court of Common Pleas of Philadelphia County seeking injunctive relief to permit it to continue with the construction of the Whitman project. (N. T. 2-34, 3-10, 3-11). Pursuant to the complaint filed by Multicon, a preliminary injunction was issued on April 2, 1971, enjoining further interference with the construction of the project. (N. T. 2-35, 3-9, 19-7). On April 6, 1971, a meeting was held in the chambers of the Honorable Ned Hirsch, the Judge assigned to the Multicon case, to determine whether the preliminary injunction issued to Multicon should continue in effect. (N. T. 3-16, 3-17). The preliminary injunction was continued in effect with the consent of all parties until April 30, 1971. (N. T. 2-35). However, all attempts by Multicon to return to work at the site proved futile. (N. T. 2-35, 2-36, 2-39, 2-77, 2-78, 3-32, 3-33, 3-38, 3-39, 19-8, 19-9). On several occasions Multicon asked the Philadelphia police for aid in enforcing their injunction against interference with construction

but were told that it was up to the Sheriff's office to enforce injunctions and that the Philadelphia police were not going to interfere by making arrests unless specifically requested by the Sheriff to do so. (N. T. 19-13, 19-16, 19-17). On April 26, 1971, Multicon obtained a writ of assistance from Judge Hirsch. (N. T. 3-36). On April 30, 1971, Multicon agreed, after a conference in Judge Hirsch's chambers, to the issuance of an order prohibiting Multicon from returning to work pending the outcome of negotiations between the parties. (N. T. 3-39, 3-40). At the conference on April 30, 1971, City Managing Director Corleto stated that Multicon would not receive police assistance. (N. T. 3-40).

Shortly thereafter, there were a series of meetings between WAIC, PHA and Multicon. (N. T. 2-78, 3-41, 3-42, 10-39). Various changes in the Whitman Park Townhouse Project were proposed to WAIC in order to settle the controversy, including opening a building in the project as a community recreation area, reserving 50% of the units for persons who were displaced by the clearance for the Whitman project, raising the income levels of those persons who would be eligible for the project and setting up a screening committee, which would include Whitman residents, to assure that those living in the project would be an asset to the community. (N. T. 3-45, 10-43, 10-44, 10-45, 10-46, 10-47). On May 17, 1971, after full discussion and consideration of the settlement proposals, WAIC voted down the final settlement offer of PHA. (N. T. 2-89, 3-45, 3-46). On May 18, 1971, Mayor Rizzo was nominated as the Democratic candidate for Mayor. (N. T. 3-53). On May 20, 1971, a meeting was held in Judge Hirsch's chambers to consider a request by Multicon that the court's order of April 30, 1971 be lifted and that Multicon be permitted to return to work on

the Whitman Park Townhouse Project. (N. T. 3-55, 3-56, 19-21, 19-24, 19-25). At the May 20th meeting, Managing Director Corleto stated that the City would not provide police assistance for Multicon should it return to work. (N. T. 3-57, 19-26 to 19-28). Mr. Gordon Cavanaugh, Chairman of PHA, stated to those present at the meeting that he had been instructed by Mayor Tate to order Multicon not to resume work. (N. T. 2-91, 3-59, 19-26, 19-34, 19-36). Judge Hirsch then signed an order permitting Multicon to return to work. However, faced with a threatened lack of police assistance, Multicon decided that it would not then return to work. (N. T. 19-38). On June 3, 1971, Multicon approached HUD in Washington, D. C. and sought assistance from HUD in building the Whitman Park Townhouse Project. (N. T. 3-69, 10-73). Multicon requested HUD to exert whatever pressure it could upon the City to get the City to cooperate in building Whitman. (N. T. 3-69, 10-73). However, a HUD official in Washington, D. C. stated that HUD did not want to take any action until after the November, 1971 election in Philadelphia. (N. T. 10-74 to 10-76).[19]

On July 14, 1971, Judge Dwyer of the Court of Common Pleas of Philadelphia County issued a permanent injunction against further interference with Multicon's construction at the Whitman site in the case of *Multicon v. WAIC*, No. 4515 (March Term, 1971, C. P. Phila.) (N. T. 3-80 to 3-81). On that same day, WAIC filed a lawsuit against Multicon, *WAIC v. Multicon*, No. 1187 (July Term, 1971, C. P. Phila.), seeking to halt further construction at the Whitman site. Trial of this lawsuit

19. Multicon also sought assistance from the regional HUD office in Philadelphia. One local HUD official suggested that HUD stop the flow of HUD money to Philadelphia until the City cooperated in the construction of the Whitman Park Townhouse Project. No action was ever taken in connection with the suggestion. (N. T. 10-76 to 10-77, 10-79 to 10-80).

commenced on August 4, 1971 and continued through September 6, 1971. (N. T. 9-92 to 9-93).

In the early part of April, 1971, when Multicon encountered difficulties with continuing the construction at the Whitman site, Lieutenant Fencl of the Civil Disobedience squad of the Philadelphia Police Department, who had been present at the site during the demonstration, suggested that it might be helpful if Multicon placed a fence around the site, even though the original plans did not call for such a fence. (N. T. 19-39, 19-40). Multicon contacted the Philadelphia Department of Licenses and Inspections to determine what permits were required to construct a fence and was informed that no license or permit was required. (N. T. 19-40, 19-41). Multicon then contacted the Department of Streets and submitted two plans for a fence around the Whitman site. (N. T. 19-42). Multicon was told to submit a written request to the Department of Streets. Thereafter, Multicon was given oral and written permission [20] to build a fence which would close off Howard and Hancock Streets, two small streets which ran only through the Whitman site, but which would keep a through street, Shunk Street, open. (N. T. 9-93, 19-49, 19-52, 19-54, 48-54). Multicon proceeded to construct a plywood fence around the construction site which was torn down by persons unknown on the night of July 5, 1971. (N. T. 9-93, 19-55 to 19-56). The policeman patrolling the area saw no one tearing down the fence. (N. T. 19-56). Thereafter, Multicon engaged a contractor to build a chain link fence with metal posts in place of the plywood fence which had been destroyed. Construction of the chain link fence began on or about August 31, 1971. (N. T. 19-58). On September 1, 1971,

20. Written permission was given by the Department of Streets on April 29, 1971. (Exhibit P96-10).

Multicon received a violation notice from the Department of Streets in connection with the fence and was ordered to cease construction and to remove the fence. (N. T. 9-96, 19-59). Multicon was told that the fence could not be placed on the sidewalk. (N. T. 19-61). Later in the day of September 1, 1971, WAIC picketed the fence subcontractor at his home in Delaware County. (N. T. 9-96). On September 2, 1971, Mr. Marrara of the Street Department went to the Whitman site and told Multicon that they would have to remove the fence from the sidewalk. (N. T. 48-53). Mr. Marrara testified that when he went to the Whitman site he assumed that a permit had been issued to Multicon to build a fence, although he had not seen the permit. (N. T. 48-67, 48-82). He also told Multicon that they could not close off Hancock and Howard Streets with their fence. (N. T. 9-96, 9-97, 19-64). Hancock and Howard Streets were both small streets which were completely enclosed within the Whitman site and on which there was no traffic, either vehicular or pedestrial.[21] (N. T. 19-64, 48-75). Within one-half hour of Multicon's refusal to remove the cemented fence posts, a city work crew with jackhammers was on the scene and, at Mr. Marrara's direction, removed the fence posts. (N. T. 19-65 to 19-66). On September 3, 1971 Multicon received two additional notices from the Department of Streets. One ordered Multicon to remove its construction equipment, mobile homes, materials and debris from the bed of legally open streets, i.e., Howard and Hancock Streets. (N. T. 19-66). All of Multicon's construction equipment referred to in the notice had been on the Whitman site since April of 1971 and was located on the streets so that the equipment would not interfere with the construction of the houses on the other areas of the site. (N. T.

21. The Whitman site had, at this point, been vacant for about ten years.

19-67, 19-68). The second notice required Multicon to construct concrete sidewalks adjacent to all streets around and through the Whitman site. (N. T. 19-69). Many of these sidewalks, particularly on Howard and Hancock Streets, were in bad repair when Multicon began construction in March of 1971 and were in the same condition when Multicon received its notice in September of 1971. (N. T. 22-45, 22-63, 48-61, 48-62). The damage to the sidewalks had occurred when PHA had cleared the Whitman site. (N. T. 22-52 to 22-53). Further, the City had agreed with Multicon prior to commencement of construction that the City would repair the sidewalks adjoining the Whitman Park Townhouse Project. (N. T. 22-52, 22-53). Nevertheless, Mr. Marrara took the position that Multicon, as owner of the land, was responsible for the sidewalks. (N. T. 22-53). Finally, Mr. Marrara did agree to allow Multicon, during construction on the site, to merely blacktop the sidewalks so that equipment could operate in the area. (N. T. 22-54). Mr. Marrara stated that he only enforced the requirement that all City streets be kept open and that sidewalks be fully repaired when someone had made a complaint in connection therewith, as had been done in this case. (N. T. 22-55, 22-56).[22] Mr. Marrara stated that he was requiring Multicon to comply in this case because it was a center of controversy. (N. T. 22-64, 48-58 to 48-60). Further, Mr. Marrara admitted that the City generally did not enforce the fence regulations in connection with high rise construction, although there was no distinction between sidewalks around high rise and low rise projects made in the City Code. (N. T. 22-56). Finally, on September 3, 1971, after a conference with Multicon and the First Deputy City So-

22. Mr. Marrara never received a complaint in connection with the trailer and construction equipment which were on Hancock and Howard Streets. (N. T. 48-102).

licitor, John McNally, the Department of Streets agreed that Multicon could erect its fence around the site precisely in the location from which the Department of Streets had previously removed it. (N. T. 22-69, 22-70). Multicon submitted a written request for a permit to construct this agreed upon fence on September 3, 1971. (Exhibit P96-10). Mr. Marrara gave written approval for the fence on September 9, 1971, stating that "At no time will any permanent barricade or fence be allowed on any . . . legally open street." Exhibit P96-11, (N. T. 48-57). The permit was also conditioned upon Multicon maintaining the footways in the area. (Exhibit P96-11).

On September 10, 1971, Multicon attempted to resume its construction of the fence but was ordered by the Department of Streets to stop until all the sidewalks were blacktopped. (N. T. 9-98). However, when the paving contractor arrived at the Whitman site, he was asked by the residents picketing along the street not to work and he honored their request. (N. T. 9-98, 22-74, 22-78). Finally, on September 14, 1971, the City ordered the construction of the fence to cease because the sidewalk was not being repaired. (N. T. 9-98). The chain link fence was never built by Multicon. (N. T. 22-77, 22-78).

Throughout Mayor Rizzo's campaign for Mayor in 1971, both during the primary campaign and the general election, he publicly took the position that within the framework of the law, he would support local communities in their opposition to public housing projects proposed for their neighborhoods. (N. T. 42-75, 42-77). Mayor Rizzo testified that, "I had a strong feeling when I ran for election, it was crystal clear, that I would preserve the neighborhoods of the City at any expense . . ." (N. T. 42-82). During his campaign, Mayor Rizzo visited Seafarer's Hall in the Whitman area, and publicly pledged his support to the community in opposition to the proposed Whitman

Park Townhouse Project. (N. T. 44-77). On that same day, he placed a personal telephone call to Fred Druding, the president of WAIC, pledging his support to WAIC in their opposition to the Whitman project. (N. T. 42-76, 42-77). Mayor Rizzo further testified that he did not know what type of public housing was planned for the Whitman area, and that the particular type of public housing proposed for an area did not influence his decision to support the local community in its opposition to a housing project. (N. T. 42-79). The only consideration was whether the community supported the project or opposed it and he would support that community. (N. T. 42-79). Moreover, in considering whether to support or oppose a particular public housing project, Mayor Rizzo testified that he did not consider the racial effect of his community support. (N. T. 42-83). While stating that "there is a possibility that it might affect the minorities, that they might be shortchanged . . .", he said that such an adverse racial impact would not change his position in support of the local community. (N. T. 42-83, 42-84).

After Mayor Rizzo's election in November of 1971, he had several meetings with James Greenlee, who was at that time both general counsel for RDA and Chairman of PHA. In November of 1971, Mr. Greenlee, as general counsel for RDA, gave a legal opinion to RDA, which was subsequently forwarded to HUD on November 23, 1971, that all required procedures had been followed in the planning and development of the Whitman Park Townhouse Project, and that no further public hearings were necessary. (N. T. 9-99, 14-18).[23] After Mayor Rizzo was

23. The request for legal opinion was made to Mr. Greenlee by Walter D'Alessio, Executive Director of RDA, because of statements made in Federal Court by Levy Anderson, Esquire, City Solicitor for Philadelphia, that all proper procedures had not been followed in connection with the Whitman Park Townhouse Project. (N. T. 14-21).

elected Mayor in November, 1971, but before he took office in January, 1972, Mr. Greenlee, as Chairman of PHA, met with Mayor Rizzo to discuss the housing program in the City of Philadelphia. (N. T. 14-23 to 14-25). Mr. Greenlee testified that the Mayor's support was necessary to develop any type of housing program in order to assure passage of the necessary ordinances before City Council. (N. T. 14-26). After discussion of the proposed public housing plans, Mayor Rizzo expressed disfavor as to the sites proposed. (N. T. 14-47). Mayor Rizzo stated that he considered public housing to be the same as Black housing in that most tenants of public housing are Black. (N. T. 14-47). Mayor Rizzo therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them. (N. T. 14-47). Furthermore, Mayor Rizzo stated that he did not intend to allow PHA to ruin nice neighborhoods. (N. T. 14-47, 14-48). After Mayor Rizzo took office in January of 1972, he told Mr. Greenlee that because of the promise he had made to the people of South Philadelphia in the Whitman project area, he did not want to build the Whitman Park Townhouse Project and asked Mr. Greenlee, as Chairman of PHA, to prevent the building of the project. (N. T. 14-49). The Mayor wanted Mr. Greenlee to obtain passage of a resolution by PHA declaring Multicon in default and the contract between PHA and Multicon void. (N. T. 14-54, 14-55, 14-59). Mr. Greenlee informed Mayor Rizzo that cancellation of the Whitman Park Townhouse Project would require paying Multicon for its losses and would jeopardize federal funding for the City, particularly in view of the fact that Whitman had been designated as a "match" for the Morton Addition project. (N. T. 14-50, 14-52, 14-53, 14-59). Mr. Greenlee suggested that Mayor

Rizzo try to obtain a compromise in connection with the Whitman project but Mayor Rizzo stated that a compromise was not possible because the people in the area felt that Black people would be moving into the area if public housing were built. (N. T. 14-55, 14-56).[24] Mayor Rizzo then stated to Mr. Greenlee that the Whitman Park Townhouse Project would not be built. (N. T. 14-62). Mr. Greenlee, when faced with this statement from the Mayor, informed Mayor Rizzo of what is referred to as the Phillips Amendment.[25] (N. T. 12-9, 14-63). This statute provided that a municipality could cancel a public housing project if in the case of Philadelphia, City Council had a public hearing in connection with the proposed cancellation and passed a resolution revoking the original authorization for the project, and agreed to repay HUD all the money it had advanced for the project and settle any claim for damages by the builder. (N. T. 14-64, 14-65). Mayor Rizzo stated that although the cost to the City of Philadelphia of using the Phillips Amendment to terminate the project was no obstacle to its use in this case, the public hearing required by the Amendment would bring Black people to City Hall to protest the proposed cancellation and hence was an unacceptable procedure. (N. T. 14-65).

During the early part of 1972, there were numerous meetings between Multicon and the new Deputy Mayor Philip Carroll, who had been assigned by Mayor Rizzo to the problems surrounding the Whitman Park Townhouse Project. (N. T. 12-15, 24-3).[26] Mr. Carroll, during these

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24. Mayor Rizzo felt that most of the people who would move into the Whitman Park Townhouse Project would be Black and that Whitman was a White neighborhood. (N. T. 14-57).

25. P. L. 176, 83d Cong., 67 Stat. 298, 306.

26. Mr. Carroll testified that, although he had daily personal meetings with Mayor Rizzo, the Mayor never enunciated his policy

meetings, told Multicon that the City did not want the Whitman project built. (N. T. 10-83). During this period, Mr. Carroll was pressed by WAIC to support their opposition to the Whitman Park Townhouse Project. (N. T. 24-15, 24-16, 24-53).

On May 25, 1972, Multicon again sought help from HUD to exert pressure on the City in connection with the building of the Whitman Park Townhouse Project. (N. T. 4-62).[27] Multicon requested that HUD take over the Whitman project. (N. T. 4-63). However, HUD stated that it was not its policy to take over projects and Multicon felt that HUD, although sympathetic, was not going to be of assistance in completing the project. (N. T. 4-63).[28] Therefore, Multicon told HUD that they would return to Philadelphia and commence construction of the project. (N. T. 4-63).

On April 28, 1972, RDA passed the following resolution, numbered 7973:

RESOLUTION AUTHORIZING ACTION RE: DEFAULT.

BE IT RESOLVED, By the Redevelopment Authority of the City of Philadelphia that General Counsel

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26. (Cont'd.)
in connection with the Whitman Park Townhouse Project to him, and all he knew about the Mayor's policy in connection with the Whitman project was what he read in the newspapers. (N. T. 24-4, 24-13, 24-14).

27. Counsel for Multicon met in Washington, D. C. with David Maxwell, general counsel for HUD. Multicon sought help from HUD in either getting construction of the project completed or bringing the project to a halt and allow Multicon to get out as well as it could. (N. T. 4-62).

28. Prior to this time, Multicon had in April of 1972 sought HUD assistance with the Whitman project from the HUD regional office. Multicon asked HUD to cut off federal funding to Philadelphia under the workable program. However, HUD stated that it would not follow that course of action for political reasons. (N. T. 35-43, 35-45).

> is authorized to take such action as may be necessary in connection with any default between Multicon Properties, Inc., provided, however, there is a representation from the Philadelphia Housing Authority of the default in its Contract for development of housing in the Whitman Redevelopment area, Whitman Urban Renewal area.

PHA never made a representation of default to RDA. (N. T. 12-16). However, on April 28, 1972, the same date as the above RDA resolution was passed, PHA Board Chairman James Greenlee wrote to Francis Meyer, former Director of RDA, informing RDA that Multicon would be in default of its contract with PHA on April 29, 1972, as follows:

> This is to notify you that on April 29th Multicon Properties, Inc., will be in default in its agreement with the Philadelphia Housing Authority in regard to the parcel owned by Multicon and the Whitman Urban Renewal Area. The agreement was entered into on October 29, 1970, and Article IV, Section A, on Page 4, commits Multicon to complete its obligations within 18 months.
>
> Multicon has not only failed to meet its obligation, but has given the Authority no indication of when, if ever, it intends to resume building. (N. T. 12-6, 12-7, 14-66).[29]

On June 15, 1972, Multicon wrote a letter to Deputy Mayor Phillip Carroll stating that it intended to resume construction of the Whitman project on Monday, June 26, 1972. (N. T. 12-17, 4-64). This letter was sent by Mr.

29. Mr. Greenlee testified that the resolution was passed in an effort to get Multicon to proceed with the project in spite of its problems therewith. (N. T. 14-68, 14-69, 14-70).

Carroll to Chief Deputy Solicitor, Sheldon Albert, Esquire. (N. T. 12-17). Mr. Albert, after receiving the Multicon letter from Mr. Carroll, prepared an equity action seeking a preliminary injunction against Multicon's resumption of work on June 26, 1972. The action, captioned *City of Philadelphia v. Multicon Properties, Inc., Multicon Construction Corp.*, No. 3538 (June Term, 1972, C. P. Phila. Co.) was filed and docketed at noon on June 22, 1972. (N. T. 12-21). On that same date, Judge Hirsch, pursuant to the motion filed by Mr. Albert on behalf of the City, granted the City an *ex parte* five-day preliminary injunction, stopping Multicon from commencing construction on Monday, June 26, 1972, pending a hearing on June 27. The complaint, filed at noon on June 22, 1972, alleged that the commencement by Multicon of construction would "necessarily result in open and forcible conflict and will threaten the peace, welfare and stability of the community and the City" and stated that:

> The defendants, further, have no legal right to construct. Its contracts and agreements with the Redevelopment Authority of the City of Philadelphia and the Philadelphia Housing Authority have terminated with defendants' failure to complete construction within eighteen months of the date of said contracts and agreements, which date has long passed, *as the Redevelopment Authority this date has so stated. Further, said contracts and agreements were void ab initio, not having been the subject of community consultation as required by law.* (N. T. 12-21, 12-22). (Emphasis supplied).

Also, on the morning of June 22, 1973, at about 10:00 a.m., the attorney for RDA in the then pending litigation, captioned *WAIC v. Multicon,* petitioned Judge Dwyer to withdraw from the jointly proposed Findings of Fact,

Conclusions of Law and Brief which had been filed on behalf of PHA, RDA and Multicon. The petition was granted on June 28, 1972. (N. T. 12-22). The papers filed by the defendants had sought a finding by the Court that all the requirements with regard to citizen participation in connection with the Whitman project had been met, a position consistently maintained by RDA throughout the litigation. At the RDA meeting held on June 22, 1972, which began at 2:30 p.m., RDA passed resolution 8058 which reads as follows:

> Be it resolved by the Redevelopment Authority of the City of Philadelphia that the contract entered into by and between Multicon Properties, Inc., and the Redevelopment Authority of the City of Philadelphia is *hereby declared to be void* AB INITIO *due to the lack of community participation in the decision-making process* as required under the various decisions of the U. S. Supreme Court, or, in the alternative, said contract presently in existence between the Redevelopment Authority and Multicon Properties, Inc., is declared to be in default, which contract became effective on July 14, 1970.
>
> Be it further resolved that counsel duly designated by the Redevelopment Authority be authorized to pursue all legal remedies available to the Authority in order to enforce the rights of the Redevelopment Authority in accordance with the terms of the aforesaid contract. (N. T. 12-23, 4-67).[30] (Emphasis supplied).

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30. The Multicon contract is the only contract which RDA has ever declared to be void *ab initio*, and, although requested by the plaintiffs, RDA has not supplied the names of the "various decisions of the U. S. Supreme Court" referred to in the resolution. (N. T. 12-24).

Deputy Mayor Carroll stated that the passage by RDA of the June 22, 1972 resolution was not a surprise to him because he had reviewed the resolution beforehand. He was also informed almost immediately after the June 22, 1972 meeting, first by Deputy to the Mayor Michael Wallace, and then by RDA Executive Director Walter D'Alessio, that there was a problem with the Resolution as drafted and submitted to RDA. (N. T. 24-97, 24-103, 24-107). Finally, on the evening of June 22, 1972, Michael Wallace, a Deputy to the Mayor appeared at a WAIC meeting and explained the position of the City in connection with the Whitman project and the RDA resolution of that day. (N. T. 12-24).

On June 27, 1972, Multicon filed a counterclaim in the equity action filed by the City, seeking $1.5 million for the alleged tortious interference by the City with Multicon's contracts to build the Whitman Park Townhouse Project. (N. T. 4-87, 12-29). On or about July 4, 1972, Dr. F. Bruce Baldwin, Chairman of the RDA Board, received a letter from William B. Patterson, HUD area director, who stated the position of HUD in connection with the June 22, 1972 RDA resolution. Mr. Patterson stated that "Such action is highly improper and an action that cannot receive our concurrence," and set forth the requirements for terminating an approved housing project under the Phillips Amendment. (N. T. 12-29).

On July 5, 1972, Mayor Rizzo wrote to John Whitaker, Deputy Assistant to the President for Domestic Affairs in the White House, as follows:

> Many thanks for taking the time to discuss the difficulties that the City of Philadelphia is currently experiencing with the Area Office of the Department of Housing and Urban Development.
>
> As I mentioned to you on the telephone this morning, I am sending you additional information re-

garding two of the most pressing problems involving two housing proposals which HUD is attempting to foster on unwilling communities.

It would appear that HUD is a prime example of carrying out a successful operation even though the patient may die as a result.

The two programs in question are:

1. Whitman Park—a Turnkey III Public Housing Project.

Morrell Park—an apartment proposal under Section 236.

Both of these proposals have met with violent opposition and demonstrations by the communities involved. In each case, the opposition stems from the quality of the proposed housing, which would downgrade the neighborhoods.

The Whitman controversy appeared to be finally settled when the Philadelphia Redevelopment Authority canceled the contract with the builder, Multicon Properties, Incorporated. HUD, however, is seeking in Federal Court to force construction of the project, much to my dismay, and has threatened other possible sanctions against the City, as shown in the attached letter received today from William Patterson, HUD Area Director.

Although Patterson states in his letter that he seeks to protect the interest of the taxpayers, it would appear that he is doing exactly the opposite.

° ° °

The City Administration has a recognized responsibility to the people of Philadelphia and can not shield itself behind any bureaucratic regulations, as in the case of certain HUD officials who apparently

> are unmindful of our problems and the practical realities of urban government.
>
> I most certainly will appreciate any help you can give in these two cases and, again, many thanks for your cooperation. (N. T. 12-30, 12-31, 12-32).

Shortly thereafter, HUD's general counsel, David Maxwell, Esquire, gave instructions by telephone to HUD Regional Director Theodore Robb to keep a "low profile" in the Whitman controversy. (N. T. 12-32, 12-33).

Following receipt from HUD of the Patterson letter, the RDA director and executive director consulted with Leon Katz, Director of the RDA Legal Division, who had not participated in the drafting of the June 22, 1972 resolution. (N. T. 12-33). As a result of the conference, the following resolution, No. 8061, was drafted to amend the June 22, 1972 resolution, and was adopted at a special RDA meeting held on July 12, 1972 at 2:15 p.m. (N. T. 12-33, 4-74).

> Be it resolved by the Redevelopment Authority of the City of Philadelphia that Resolution No. 8058, adopted by the duly constituted Board of the Redevelopment Authority on June 22, 1972, is hereby amended to read as follows:
>
> Be it resolved by the Redevelopment Authority of the City of Philadelphia that Multicon Properties, Inc., is hereby declared to be in default of a contract presently in existence by and between the Redevelopment Authority and Multicon Properties, Inc. (redeveloper), which contract became effective on July 14, 1970.
>
> Be it further resolved that counsel duly designated by the Redevelopment Authority be authorized to pursue all legal remedies available to the Authority

in order to enforce the rights of the Redevelopment Authority in accordance with the terms of the aforesaid contract. (N. T. 4-74, 12-33).

After passage of the June 22, 1972 RDA resolution, Multicon informed the City, RDA and PHA that it would not resume construction because it felt it had an obligation to mitigate the damages it was seeking as a result of the resolution and the City's equity action. (N. T. 4-68 to 4-71, 35-52). RDA, with the exception of one member of its Board, did not consider the racial effect of its two resolutions dated June 22, 1972 and July 12, 1972, but maintains that it has no responsibility to consider such racial impact. (N. T. 12-35). After passage of the July 12, 1972 resolution, Multicon sought by letter on July 25, 1972 advice from RDA as to whether it should seek to cure its alleged default under its contract with RDA. (N. T. 4-78 to 4-81, 12-34). Multicon received no response from RDA in connection with its July 25 letter as to whether it should cure its alleged default. (N. T. 4-86). Settlement negotiations continued between Multicon and the City in connection with Muliticon's counterclaim in the City's equity action against Multicon. (N. T. 35-58). The action was finally settled on December 14, 1972 by the City agreeing to pay Multicon $806,000. (N. T. 4-89, 12-36).

According to HUD, there is presently available the sum of $3.68 million for the construction of the Whitman Park Townhouse Project as planned. (N. T. 12-74).

Whitman Demonstrations.

The opposition to the Whitman project took the form of mass demonstrations at the project site led by WAIC. Frequently, demonstrators would surround a piece of construction equipment and prevent the workmen from operating the equipment. Demonstrators also prevented trucks

from making deliveries to the area. (N. T. 21-10, 21-13, 3-83, 49-101). Some of the demonstrators engaged in name calling, obscenities, threats, and the use of racial slurs. (N. T. 21-10, 21-13, 49-126, 49-130, Exhibit P-91). Other demonstrators stated that they did not want their neighborhood exposed to the type of people who would move into the proposed public housing. (N. T. 21-16, 29-72, 29-75, 33-109, 33-110, 33-118, 33-121, 54-21).[31] A few demonstrators expressed their opposition to the Whitman Park Townhouse Project on the basis that it would bring Blacks into the neighborhood and destroy the racial homogeneity of the area. (N. T. 18-67, 18-68, 18-84, 28-13, 28-14, 28-15, 28-85, 54-183, 54-184, 54-188, 42-18, 42-22). The residents and members of WAIC who opposed the Whitman Park Townhouse Project publicly stated their opposition thereto on the basis that public housing projects are unsafe, unsanitary, lead to increased crime or that the proposed residents of the Whitman project were going to receive something for nothing, which members of WAIC were unable to receive because of their higher incomes. (N. T. 54-21, 56-10, 56-11).

Racial Composition of the City of Philadelphia.

The City of Philadelphia is today a racially segregated city. (N. T. 31-74, 31-75, 50-67).[32] Moreover, 95% of the

31. Statements made by Whitman residents and WAIC members often referred to residents of public housing as "they" or "them".

32. Defendant's expert stated, "So I think a reasonable conclusion would be that Philadelphia is obviously segregated along with all 200 other cities studied." (N. T. 50-78). The evidence presented at trial shows that other major cities in the East and Northeast are also racially segregated. (N. T. 50-68, 50-71, Exhibit D-1, D-2). Philadelphia, according to one study, has become slightly less racially segregated in the last ten years, as did every other major Eastern and Northeastern city indexed by defendant's expert, with the exception of Newark, New Jersey. (Exhibit D-1, D-2, D-3).

people on the waiting list for public housing in Philadelphia are of minority background, 85% being Black while 10% are from other minority groups. (N. T. 31-127). Since the close of the 19th century, a significant percentage of the population of the City of Philadelphia has been Black. (N. T. 31-42, 31-43).[33] During the early 1900's, however, the Black population of Philadelphia was widely distributed throughout the City. (N. T. 31-43, 31-44, 31-49, Exhibit P-142A). With the advent of World War I and a greatly increased migration of Blacks to the industrialized cities, the Black population became concentrated in certain defined areas of the City. (N. T. 31-46, 31-63). By 1939, the Black population was concentrated in three areas of the City, North Philadelphia (the area just north of Center City), West Philadelphia, north of Market Street, and South Central Philadelphia (immediately south of Center City toward the Schuylkill River), (N. T. 31-56, Exhibits P-143, P-144).[34] At the same time, the Black population in Philadelphia decreased in the Northeast, the Northwest, the Southwest and the Southeast section of the City. The area comprising the Whitman project observed a decline of about 300 in its Black population between 1930 and 1940 and in 1970 there were only 100 Black residents in the area. (N. T. 31-57, 31-70, Exhibits P-146, P-147, P-148, P-152, P-154). Since 1940, the Black population of the City of Philadelphia has been on the increase. (N. T. 31-64, 31-65). In the period 1950-1960, following World War II, there was a large migration of Black people from the South to the North-

33. At the end of the 19th century, the Black population in Philadelphia had reached 40,000, placing Philadelphia second in Black population among the ten largest cities in the United States. (N. T. 31-43).

34. In 1940, the Black population in the City of Philadelphia was 252,757, and comprised 13.1% of the total population in Philadelphia. (N. T. 31-63).

eastern United States. (N. T. 31-65). In 1970, 34.4% of the population in the City of Philadelphia was non-White. (N. T. 31-68, 50-90).[35]

As the Black population in Philadelphia has increased from 1940 until the present, the West Philadelphia Black population area has grown to include an area south of Market Street and the North Philadelphia Black population has expanded considerably to the north. (N. T. 31-67, 31-69).[36] However, large areas of Philadelphia have remained areas with very few Black residents and indeed, some areas since 1940 have shown a decrease in Black population. (N. T. 31-70, 31-72, 31-73, Exhibits P-188, P-189). In 1970, 68.9% of all Blacks in Philadelphia lived in areas which were 75% or more Black. (N. T. 31-75). In the ten years between 1960 and 1970, there was an increase in those areas which are racially impacted, i.e., have a minority concentration of 40% or more. (N. T. 51-59, Exhibits P-152, P-154).[37]

PHA was created in 1937 and adopted a policy which resulted in the segregation of its public housing projects according to the racial composition of the neighborhood

35. In 1960, the non-White population of Philadelphia comprised 26.7% of the total population. (N. T. 50-89). This increase in percentage of the City's total population between 1960 and 1970 represented an increase of 135,000 Blacks.

36. Defendant's expert testified that the Black population has shown some mobility in the recent past. However, he conceded that such mobility did not result in a racial mixture but simply a reconcentration of Black population in more racially impacted areas of the City, and the expansion was probably the result of the large growth of Black population. (N. T. 51-67, 51-74). Further, defendant's expert testified that there were only three census tracts in the City of Philadelphia which could be characterized as having a stable interracial population composition. (N. T. 51-79).

37. These areas increased, according to the defendant's expert, because the total Black population increased, while the total population of Philadelphia remained stable. (N. T. 51-59). This also led to an increase in the total number of census tracts containing Black population of over 10%. (N. T. 51-60).

in which they were located. (N. T. 31-76, 31-79).[38] As a result of this policy, the first housing projects acquired by PHA, Tasker Homes, Johnson Homes and Richard Allen Homes, became segregated: Johnson and Allen being over 90% Black, while Tasker was over 90% White. (N. T. 31-80, 31-88, 31-89, 31-90, Exhibit P-145). By 1950, PHA had acquired five additional housing projects, all located in White areas of Philadelphia and all occupied overwhelmingly by White tenants. (N. T. 31-92, 31-94, Exhibit P-146). Between 1950 and 1960, PHA took over 15 new public housing projects, which more than doubled the public housing stock in Philadelphia. (N. T. 31-95, 31-96). Of the fifteen new projects, eleven were built in the three Black areas of Philadelphia and were populated 96% by Black tenants. (N. T. 31-96).[39] The four other new projects were located in White areas of Philadelphia and were tenanted 88% by White tenants. (N. T. 31-96, 31-97). As of 1960, only one public housing project operated by PHA could be characterized as integrated. (N. T. 31-97). All the other projects were tenanted in accordance with the racial composition of the area in which they were located. Presently, PHA operates under a policy which it characterizes as "a freedom of choice policy," pursuant to which tenants are permitted to list their choice concerning the location of the public housing projects which they prefer. (N. T. 56-70, 56-77).

In the ten year period 1960 to 1970, PHA constructed twelve new public housing projects, nine of which were built in overwhelmingly Black neighborhoods. (N. T. 31-98, 31-104). After 1970, PHA's housing construction

38. *See Favors v. Randall*, 40 F. Supp. 743 (E. D. Pa. 1941) in which the court upheld this policy of racial segregation.

39. There was one exception, Spring Garden Apartments, which was under 90% Black, but still populated overwhelmingly by Black tenants. (N. T. 31-96).

activity slowed somewhat with seven additional projects being built adding only 270 units. Five of these projects were located in overwhelmingly Black neighborhoods, and two were located in racially mixed neighborhoods. (N. T. 31-104, 31-105). There are presently 50 public housing projects in Philadelphia operated by PHA on which occupancy reports have been obtained. (N. T. 31-105, 31-106).[40] As of June, 1974, forty of these projects were 75% or more Black occupied, and six were 90% or more White occupied. (N. T. 31-106). Two of the four remaining projects were housing for the elderly built in racially mixed neigborhoods. (N. T. 31-107).

PHA has also established a program of scattered site housing, in which a housing unit is bought or leased by PHA and offered to public housing tenants. (N. T. 31-119).[41] As of 1969, well over 90% of all scattered site units in Philadelphia were concentrated in two of the three Black areas of Philadelphia. (N. T. 31-117, Exhibits P-149, P-158).[42] This policy of locating scattered site units in predominantly Black residential areas of Philadelphia has continued to the present time. (N. T. 31-120, 31-121).

PHA public housing projects continue to reflect the racial composition of the neighborhood in which they are located. (N. T. 31-124, 31-125, 31-128). Those located in White neighborhoods are predominantly White, while those located in Black neighborhoods are predominantly

40. This number does not reflect additions to existing projects, which HUD considers as separate projects. (N. T. 31-106).

41. The scattered site housing program includes both houses which PHA purchases and renovates and leases to public housing tenants, and houses which PHA leases from a private owner and then offers as public housing. (N. T. 31-119).

42. Prior to 1969, City Council had restricted its authorization for the acquisition of scattered site housing by PHA to West Philadelphia, north of Market Street, an area of concentrated Black population. (N. T. 31-118).

Black. Most of the public housing projects and the scattered site units are located in Black residential areas of the City of Philadelphia. (N. T. 31-128). As of 1974, 90.8% of all the units in the public housing stock of Philadelphia were occupied by non-White tenants. (N. T. 31-126, Exhibit P-194). The percentage of non-White public housing occupancy has increased steadily from 1963 until the present. (Exhibit P-194).[43] Further, one-half of the White families living in public housing in 1974, lived in projects which were 95% or more White. (N. T. 31-129).

As of 1970, of the 54,000 families in Philadelphia with incomes below the poverty level,[44] over 31,000, or 58% were Black. (N. T. 31-130). In addition, 77% of Black households in Philadelphia had incomes below the median income for the standard metropolitan area, while only 52% of the White families were below the median. (N. T. 31-130). Further, the areas of the City of Philadelphia which have the highest concentration of lowest income families are precisely those areas which have the highest concentration of Black population, i.e., the three previously identified Black areas of Philadelphia. (N. T. 31-131). This points to the obvious conclusion that there is a coexistence between race and low income in Philadelphia.[45] Also, these areas of high concentration of Black population

43. In 1972, 84% of the public housing units in Philadelphia were occupied by non-White tenants. (Exhibit P-194).

44. The poverty level is defined as those families whose income averages less than $500.00 per person per year. (N. T. 31-130).

45. Defendant's expert testified that the Black population had shown overall economic improvement in the ten years between 1960 and 1970. (N. T. 51-70 to 51-74). However, he did not take issue with the conclusion that Blacks live in the poorest sections of Philadelphia and represent a higher percentage of the lowest income levels in Philadelphia. Indeed, defendant's expert testified that the median low income level of Blacks in Philadelphia has prevented their movement, in terms of housing, to predominantly White areas of the City. (N. T. 51-75, 51-76).

have the lowest percentage of owner occupied housing in Philadelphia. (N. T. 31-133, Exhibits P-156, P-157). The three areas which have been identified as the predominantly Black areas of Philadelphia contain owner occupied housing with the lowest values in Philadelphia. (N. T. 31-133, 31-134, Exhibits P-158, P-159). As of 1970, the highest incidence of overcrowded housing units in Philadelphia occurred in the three Black residential areas of Philadelphia. (N. T. 31-135, Exhibit P-163). These statistics clearly reveal that the Black population in the City of Philadelphia is concentrated in residential areas of the City which are characterized by the lowest housing quality, and the highest incidence of overcrowding. Finally, combined with the fact that the Black population has a disproportionate number of people with incomes below the poverty level these statistics lead to the conclusion that the Black population in Philadelphia occupies the poorest housing because it cannot afford to live elsewhere.

As noted earlier, the area comprising the Whitman project observed a decline of about 300 in its Black population between 1930 and 1940 and in 1970 there were only 100 Black residents in the area. (N. T. 31-57, 31-70, Exhibits P-146, P-147, P-148, P-152, P-154). Clearance for the Whitman Townhouse project took place in 1959 and 1960 and clearance for the Whitman Urban Renewal Project took place in the late 1960's, prior to 1969. (N. T. 31-144). In 1950, the area which became the site for the Whitman Park Townhouse Project, i.e., bounded by Porter Street to the north, Oregon Avenue to the south, Front Street to the east, and midway between Second Street and Hancock on the west, contained a large number of Black families. Indeed, in 1950, 46% of the families living on the Whitman site were Black, which made this area an in-

tegrated section of Philadelphia. (N. T. 31-146). As of 1960, when the Whitman site was being cleared, four Black families remained on the Whitman site, while the area adjacent to Second Street had a substantial increase in the number of Black families. (N. T. 31-147, Exhibits P-169, P-195).[46] However, by 1970, after completion of the clearance for the Whitman Park Townhouse Project and the Urban Renewal, there were no Black families living in the southeastern portion of the Whitman area. (N. T. 31-148, Exhibit P-170).[47] The area adjacent to the west of the Whitman Park Townhouse Project site, i.e., Third and Phillip Streets, which contained many Black families, was cleared by RDA in the course of its activities in connection with the Whitman Urban Renewal Area. New townhouses have been built in this area consisting of over 100 units, which are now occupied exclusively by White residents. (N. T. 31-153, 31-154, Exhibit P-195). The effect of these urban clearance actions by both RDA and PHA appears to have converted an integrated area of Philadelphia into a non-integrated area.

In the years between 1967 and 1972, several public housing projects, in addition to the Whitman Park Townhouse Project, were proposed for construction in predominantly White areas but were never completed because of public opposition. For example, in the fall of 1968, a 192 unit public housing project was proposed for the Roxborough area of Philadelphia, a White area of the City. However, opposition surfaced to the proposed project and the developer abandoned the project. (N. T. 6-43, 6-47, 6-48, Exhibit P-33). In addition, a public housing project proposed for Welsh Road in the near Northeast section of

46. The number of Black households in blocks adjacent to the Whitman site doubled from 15 to 30. (Exhibit P-195).

47. The only area in which there are any Black households in the Whitman area is the far northeast corner of the Whitman area. (N. T. 31-148, Exhibit P-170).

Philadelphia, a White area of the City, which required a zoning change, was dropped when public opposition arose. (N. T. 6-48, 6-50, Exhibit P-33). In the far Northeast section of Philadelphia, a predominantly White area of the City, 92 units of Turnkey III public housing were proposed for Woodhaven and Barbary. A zoning change was required and public opposition arose which resulted in the developer changing his plans and proposing 110 units of higher density, unsubsidized housing, which the community supported. (N. T. 6-53, 6-55, 6-58, 6-59).

Standing.

The defendants contend that the record in this case does not support a finding that any plaintiffs, either individual or organizational, have standing to represent the class certified by this Court. In an Order dated May 7, 1975 this Court certified this case as a class action on behalf of "all low income minority persons residing in the City of Philadelphia who, by virtue of their race are unable to secure decent, safe, and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman Park Townhouse Project." It is, of course, elementary that in order to maintain a class action there must be at least one named plaintiff, whether individual or organizational, who has established the requisite standing to maintain the action. *Simon v. Eastern Kentucky Welfare Rights Organization*, 44 U. S. L. W. 4724 (June 1, 1976). Plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U. S. 490, 502 (1975).[48] The question of standing is in

48. *See* Simon v. Eastern Kentucky Welfare Rights Organization, 44 U. S. L. W. 4724, 4728 n. 20 (June 1, 1975).

essence the question of whether the plaintiffs are entitled to have the court decide the merits of the dispute and "involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U. S. 490, 498 (1975).[49] "[T]he standing question in its Art. III constitutional aspect 'is whether the plaintiff has "alleged such personal stake in the outcome of the controversy" to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Simon v. Eastern Kentucky Welfare Rights Organization*,[49] 44 U. S. L. W. at 4728, quoting from *Warth v. Seldin*, 422 U. S. 490, 498-499 (1975). The party seeking review must himself have suffered an injury that is likely to be redressed by a favorable decision. *Sierra Club v. Morton*, 405 U. S. 727, 738 (1972).

An association or organizational plaintiff may establish standing in either of two ways. First, an organization may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the organization itself may enjoy. In seeking relief from injury to itself, the organization may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. *NAACP v. Alabama*, 357 U. S. 449, 458-460 (1958).

49. In the Supreme Court's recent opinion in Singleton v. Wulff, 44 U. S. L. W. 5213 (July 1, 1976) the Court framed the issue as follows:

> [T]wo distinct standing questions are presented. We have distinguished them in prior cases, . . . and they are these: first, whether the plaintiff-appellees allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-appellees are proper proponents of the particular legal rights on which they base this suit. 44 U. S. L. W. at 5215.

Second, even in the absence of injury to itself, an organization may have standing solely as a representative of its members, so long as the organization alleges "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U. S. 490, 511 (1975).

Apart from these minimal constitutional mandates, there are other prudential limitations on the standing requirement of plaintiffs in the U. S. District Court. These limitations were recently enumerated by the U. S. Supreme Court as follows:

> First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U. S. at 499.[50] (Citations omitted).

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50. In Singleton v. Wulff, 44 U. S. L. W. 5213 (July 1, 1976), the U. S. Supreme Court enumerated two exceptions to the rule that a litigant may not assert the rights of third parties not involved in the lawsuit. The Supreme Court stated that if the relationship of the litigant to the person whose right he seeks to assert is "inextricably bound up with the activity the litigant wishes to pursue, the Court . . . can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." Second, the Court may inquire into the ability of the third party to assert his own right. "If there is some genuine obstacle to such assertion," the third party who is in court becomes "the right's best available proponent." 44 U. S. L. W. at 5216. Because under the facts of this case we have no third party involvement, these exceptions are not applicable to this case.

With these principles in mind, we will look to the facts of this case and analyze the standing of the plaintiffs involved. The primary focus of our inquiry in this suit turns upon whether an individual plaintiff has established an actual injury, or whether the plaintiff organizations have established actual injury to any of the persons which they represent.

Jean Thomas, a Black woman, testified that she was currently living in public housing which was unfit for her family, that her current "scattered site" house is located in a racially impacted area of the City, that she has applied to PHA for a transfer, that there is no space available for her and that she would like to move to the Whitman project if it is built. We find that Ms. Thomas has sufficiently established that she will be immediately and personally injured if the Whitman project is not built.[51] Further, Ms. Thomas does not allege a generalized grievance which is shared by a large class of citizens, nor does she seek to represent a third party not a plaintiff in this action. *Warth v. Seldin*, 422 U. S. 490, 499 (1975).

After the trial of this case, the defendants alleged that Ms. Thomas wished to change her testimony. However, after a hearing Ms. Thomas refused to testify on the basis of her Fifth Amendment privilege against self incrimination. Therefore, her testimony remains unchanged, attacked only by allegations by other counsel in the case that her trial testimony was false. However, even with Ms. Thomas' testimony stricken from the record in this case, Nellie Reynolds, chairperson of RAB, testified, and, although she testified in her representative capacity as the head of RAB, in the cross-examination of Ms. Reynolds it

51. Ms. Thomas did not testify that she was scheduled to move to the Whitman project. However, the tenants had not yet been selected for the Whitman area, other than that the tenants were to be from public housing eligibility lists. Her failure to testify that she would have moved to Whitman does not destroy her standing.

was established that she had the requisite standing to be a plaintiff. Ms. Reynolds, a Black woman, lives in a high rise public housing project located in a Black area of the City. She testified that she was dissatisfied with her current housing, that she would like to live in an integrated area of Philadelphia and that the Whitman Park Townhouse Project would have provided her with such an opportunity. Ms. Reynolds testified that, at present, no such openings exist. She asserted more than a generalized grievance shared by a large class and she does not seek to represent the interests of a third party.

In addition, we find that RAB is a proper party plaintiff with standing to represent its members. Although there is no allegation that RAB was injured as an organization by the termination of the Whitman project, it is clear that RAB has established actual injury to its members. As pointed out earlier, RAB is an organization composed of persons who are living in public housing or who are eligible for public housing. RAB's membership is 95% Black and RAB represents all those who are tenants in public housing or are eligible to become tenants. RAB contends that low income minority residents of the City of Philadelphia are unable, because of their race, to secure decent housing outside areas of minority racial concentration and that the failure to build Whitman has deprived them of the opportunity to escape from these conditions. Clearly, if RAB's claims are legally cognizable, its members have been injured by the failure to build the Whitman project. Those RAB members who live in racially impacted areas of the City of Philadelphia are obviously harmed by the failure to build a scheduled housing project in a non-racially impacted area. Those on the waiting list, which is predominantly Black, have lost the opportunity to live in public housing in a White area. Further, the complaint in this case seeks only declaratory and injunctive

relief which is prospective in nature and any remedy granted can reasonably be expected to inure to the benefit those members of the association who have been actually injured. *Warth v. Seldin*, 422 U. S. 490, 515 (1975). We find, that the members of RAB will suffer actual injury if the Whitman project is not built.

The issue as to the standing of the Housing Task Force presents a more difficult question. However, since we have determined that there are other plaintiffs in this case who possess the standing required to maintain the action, we need not decide the standing of the Housing Task Force. We do note, however, that the evidence shows that at least one member of the Housing Task Force currently resides in public housing.

Class Action Determination.

As stated herein this Court has certified this action as a class action on behalf of "all low income minority persons residing in the City of Philadelphia who, by virtue of their race are unable to secure decent, safe, and sanitary housing, outside of areas of minority concentration, and who would be eligible to reside in the Whitman Park Project." In their briefs attacking the plaintiffs' standing in this case, the defendants, although not specifically addressing the class action issue, have argued that the claims of the plaintiffs are not typical of the claims of the class, and that therefore the representative parties will not fairly and adequately protect the interests of the class as required by Rule 23(a) (3) and (4) Federal Rules of Civil Procedure.[52] We find that the plaintiffs in this case

52. Rule 23(a) of the Federal Rules of Civil Procedure provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of

do present claims that are typical of those of the class and will fairly and adequately protect the interests of the class. The plaintiffs are presently in public housing or represent those who are in public housing or who are on the waiting list for public housing. Defendants contend that the plaintiffs have never applied to live in the Whitman project and therefore were not harmed by the failure to build Whitman. We find no merit to this contention in view of the fact that there was no procedure for anyone to apply for admission since the Whitman project was never constructed. We find that this action is appropriate for class treatment under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

The Merits.

Plaintiffs have advanced three separate legal theories which they claim establish liability against all the defendants under the facts of this case. First, plaintiffs argue that the governmental defendants have an obligation under Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act) 42 U. S. C. § 3601 *et seq.*, to act affirmatively to promote integration in all federally assisted housing programs. Plaintiffs argue that the action taken by the governmental defendants in this case perpetuates the existing racially segregated low income public housing system in the City of Philadelphia and hence violates the affirmative duty imposed by Congress under the 1968 Fair Housing Act. On the basis of this record we find that the governmental defendants have failed to exercise their affirmative duties imposed by the 1968 Civil Rights Act in connection with the Whitman Park Townhouse Project.

52. (Cont'd.)
the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Second, the plaintiffs contend that Title VIII of the Civil Rights Act of 1968, 42 U. S. C. § 3601 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, preclude governmental and private action which has an adverse racial effect or a racially discriminatory effect. Under this second theory, plaintiffs contend that they need only establish that the governmental and private actions taken to cancel the Whitman Park Townhouse Project had an adverse effect on racial minorities, or a racially discriminatory effect. The burden would then shift to the defendants to show a compelling governmental interest justifying the adverse racial effect. We find that the actions taken by the governmental defendants in this case have had a racially discriminatory effect and that those defendants have established no compelling governmental interest justifying their action.

As to their third theory of liability, plaintiffs contend that the evidence presented in this record shows that the governmental and private defendants acted with a racially discriminatory purpose or intent in terminating the Whitman Park Townhouse Project. Such action taken with a racially discriminatory purpose would violate the Fifth, Thirteenth, and Fourteenth Amendments, as well as the various Civil Rights Statutes, 42 U. S. C. §§ 1981, 1982, 1983, 2000d, and 3601 *et seq.* Plaintiffs contend that once a racially discriminatory purpose or intent is found, there is no defense and liability follows. We also find that the evidence in this record establishes that the City of Philadelphia acted with a racially discriminatory purpose in halting the Whitman Park Townhouse Project, and in cancelling the contracts with Multicon therefor.

a) Affirmative Duty.

As to the plaintiff's first theory of liability, i.e., that the governmental defendants were obligated to act affirma-

tively to promote integration in all federally funded housing, we note that Congress has long been concerned with the complex and severe problems created by segregated housing in the United States and has accordingly enacted various statutes intended to remove racial discrimination in housing. Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d bans racial discrimination in all federally assisted programs in the following language:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Congress extended the prohibition on race discrimination to private housing and added provisions applicable to governmental housing which were designed to give further force to the provisions of the 1964 Act when it enacted the fair housing provisions contained in Title VIII of the Civil Rights Act of 1968, 42 U. S. C. § 3601 *et seq*. The 1968 Act states that:

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U. S. C. § 3601.

The operative section of Title VIII, 42 U. S. C. § 3604, bars discrimination in the sale or rental of housing, including both governmentally and privately operated units, as to both the actual sale or rental and all terms and conditions, in the following language:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin. (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

Along with outlawing private housing discrimination for the first time, the sponsors of the Fair Housing Act determined that the provisions of Title VI of the Civil Rights Act of 1964 prohibiting discrimination in federally assisted housing required strengthening. Senator Brooke, in stating that the 1964 Act had not achieved its desired effect, stated:

> Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed. 114 Cong. Record 2527-2528.

Senator Brooke pointed out that "an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government —is racially segregated." 114 Cong. Record 2528. Senator Brooke also stated:

> What adds to the murk is officialdom's apparent belief in its own sincerity. Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph—even as he ok's public housing sites in the

> heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it.
>
> . . . But when you ask one of these gentlemen why, despite the 1962 fair housing Order, most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials. 114 Cong. Record 2281

Senator Brooks concluded by saying:

> In other words, our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation. *Id.*

Senator Mondale also addressed the actions of government in promoting or continuing racial segregation in housing:

> Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively White areas.
>
> In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing . . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels. 114 Cong. Record 2277. (Quoting the *Milwaukee Journal*).

The preceding passages make it clear that Congress was well aware of governmental action contrary to previous

legislative prohibitions of racial discrimination in housing. Congress was aware of the refusal of certain communities to accept low income housing, which refusal added to the inability of low income Blacks to escape their "slum ghettos." Therefore, in an effort to end segregation in public housing Congress enacted § 3608(d)(5), requiring affirmative action by HUD and HUD assisted agencies to cure this widespread problem. That section provides that:

> (d) The Secretary of Housing and Urban development shall—
>
> > (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter. 42 U. S. C. § 3608(d)(5).

It is this provision, commanding affirmative action to end segregation in housing and to promote fair housing, which we find the governmental defendants in this case have violated.

We are, of course, guided in our determination of the standards required by governmental agencies under § 3608 (d)(5) by our Third Circuit's decision in *Shannon v. HUD*, 436 F. 2d 809 (1970). The Third Circuit in *Shannon* described the progression in the Civil Rights Acts from the commands of the 1964 Act of non-discrimination to the affirmative requirements in the 1968 Act that governmental agencies promote fair housing as follows:

> Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary, in examining whether a plan presented by a LPA in-

> cluded a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing. 436 F. 2d at 816.

In *Shannon*, HUD had failed to consider the racial composition of the area in which low-moderate income housing was to be constructed before its issuance of a contract of insurance and approval of a project for a rent supplement contract. Rather HUD had only examined the land use factors involved in approving the project. The Court stated that the discretion of HUD to choose the methods of achieving the national housing objectives "must be exercised within the framework of the national policy against discrimination in federally assisted housing, 42 U. S. C. § 2000d, and in favor of fair housing. 42 U. S. C. § 3601. When [a] . . . decision is made without consideration of relevant factors it must be set aside." 436 F. 2d at 819.[53] The Court in *Shannon* held that HUD could not be "color blind" in connection with the "very real effect that racial concentration has had on urban blight," 436 F.

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53. The Court in *Shannon* held that the decision of HUD was reviewable under 42 U. S. C. § 3608(d)(5) to determine whether the affirmative duties required under the Act had been met. 436 F. 2d at 820

2d at 820, and noted that "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." 436 F. 2d at 821.

Other courts have agreed with our Third Circuit and have held that the affirmative duty required by Title VIII of the 1968 Civil Rights Act applies not only to HUD but applies as well to other governmental agencies administering federally financed housing programs. *Garrett v. City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974); *Blackshear Res. Org. v. Housing Auth. of City of Austin*, 347 F. Supp. 1138 (W. D. Tex. 1972). In *Otero v. New York City Housing Authority*, 484 F. 2d 1122 (2d Cir. 1973), a case involving the assignment of tenants to a low-income housing project,[54] the Court stated that the New York City Housing Authority was "under an obligation affirmatively to achieve integration in housing," and that a "source of the affirmative duty to integrate is found in the 1968 Fair Housing Act . . . ." 484 F. 2d at 1133. The Court in *Otero* pointed out that under Title VIII:

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54. In *Otero*, a low-income housing project was constructed on a site which, according to the regulations of the New York City Housing Authority, required giving former site residents a priority on admission. If the priority were followed, the project would be 80% non-White and 20% White in an area which currently had a 50-50 racial mix. The authority was concerned that such a large concentration of non-Whites would act as a "tipping" factor which would precipitate an increase in non-White population in the surrounding neighborhoods. The Second Circuit concluded that the affirmative action obligation of § 3608(d)(5) precluded adherence to the priority regulation due to the segregating effect:

> Such a rule of thumb gives too little weight to Congress' desire to prevent segregated housing patterns and the ills which attend them. To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons unwilling, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers. 484 F. 2d at 1134.

> An authority may not, for instance, select sites for projects which will be occupied by non-Whites only in areas already heavily concentrated with a high proportion of non-Whites . . . .
>
> An authority is barred from using assignment methods which seek to exclude, or have the evident effect of excluding, persons of minority races from residing in predominantly White areas or of restricting non-Whites to areas already concentrated by non-White residents. 484 F. 2d at 1133. (Citations omitted).

The Second Circuit, in *Otero*, citing *Shannon*, then stated:

> [W]e are satisfied that the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat. . . .
>
> The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members. 484 F. 2d at 1133-1134.

In *Banks v. Perk*, 341 F. Supp. 1175 (N. D. Ohio 1972) *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973), the plaintiffs brought suit against the City of Cleveland and the Cleveland Housing Authority. Cleveland was found by the Court to be a racially segregated city. Prior to the date on which the new City administration took office, it announced that it would oppose public housing in areas where the majority of the residents were opposed to the project. Two days after taking office, the administration revoked a building permit issued to a builder who was planning to build a low income public housing project in a White area of the City. Twelve days later, a similar permit was suspended. The Court found in both instances that the reasons given by the City for revocation of the permit were without factual basis. The Court found that the City's revocations had a racially discriminatory effect and violated 42 U. S. C. § 2000d and 42 U. S. C. § 3608(d)(5). As to the City administration's policy in connection with its support for local communities, the Court stated:

> The aforementioned public pronouncements to oppose public housing in any areas where the residents are opposed to it and the City's continued affirmations of that proposition are contrary to the national housing policy. It is the duty of city administrations in the United States to support and aid progressive proposals which have as their goal the elimination of racial concentrations in their cities. No matter how a housing authority may try, their aims and goals cannot be met without the support and leadership of the administration within the city it attempts to build public housing. Since this nation is committed to a policy of balanced and dispersed public housing, low-income Blacks can no more be con-

> fined to a concentrated area than that they can be required to send their children to segregated schools. 341 F. Supp. at 1179.

The Court in *Banks* also applied the affirmative obligation requirement of 42 U. S. C. § 3608(d)(5) to the Cleveland Housing Authority and found that it had not met its obligation thereunder when it failed to place most of its new housing projects in White areas of the City. The freedom of choice plan of the Authority, which was neutral on its face but resulted in continued racial concentration, could not stand in light of the affirmative obligations of the Fair Housing Act. The Court stated that:

> CMHA has an affirmative duty to integrate its housing projects and to be instrumental in dispersing urban housing patterns. The Fair Housing Act of 1968, 42 U. S. C. § 3601 *et seq.* in establishing a national policy of fair housing throughout the United States carried with it the clear implication that local housing authorities in conjunction with Federal agencies responsible for housing programs are to affirmatively institute action the direct result of which was to be the implementation of the dual and mutual goals of fair housing and the elimination of discrimination in that housing. 341 F. Supp. at 1182.[55]

Other courts have also found violations of the affirmative duties placed upon HUD and local agencies under 42

55. Many of the cases cited herein found violations of both the Fourteenth Amendment's Equal Protection Clause, 42 U. S. C. § 1981 and § 1983, as well as 42 U. S. C. § 2000d and 42 U. S. C. § 3608(d)(5). These cases were decided prior to Washington v. Davis, – U. S. –, 96 S. Ct. 2040 (1976), which held that racially discriminatory intent or purpose was required to establish a constitutional violation. However, each of these decisions did find a violation of the affirmative duty of governmental agencies under 42 U. S. C. § 3608(d)(5).

U. S. C. § 3608(d)(5) in circumstances similar to those in this case. *Garrett v. City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974); *Blackshear Res. Org. v. Housing Auth. of City of Austin*, 347 F. Supp. 1138 (W. D. Tex. 1972); *Crow v. Brown*, 332 F. Supp. 382 (N. D. Ga. 1971), *aff'd*, 457 F. 2d 788 (5th Cir. 1972).

Each case brought under § 3608(d)(5) requires a close analysis of the facts peculiar to that case and the city in which the facts have occurred. Before proceeding to analyze the liability of each individual governmental defendant, it is appropriate to note several significant factors which form the background against which the actions of the governmental defendants involved herein must be viewed. First, it is beyond question that the City of Philadelphia is racially segregated, and was so in 1971 and 1972. It is also clear that the low-income public housing system operated by PHA is also racially segregated with those projects located in Black areas being populated by predominantly Black tenants, while those in White areas are populated by predominantly White tenants. Further, 31 of the 40 PHA projects, or 77% of the PHA projects, are currently located in racially impacted areas of Philadelphia while only 9 of the 40, or 23% of the PHA projects are currently located in non-impacted areas. (N. T. 53-21). Moreover, the evidence presented clearly establishes that the overwhelming majority of the scattered site houses acquired by PHA are located in racially impacted areas of Philadelphia, a process which reinforces segregation both in the City of Philadelphia and in the low-income public housing system. (N. T. 38-55).[56] The public housing system operated by PHA is predominantly Black. As of

56. Defendants' expert testified that 82% of the scattered site units operated by PHA are located in racially impacted areas of Philadelphia, i.e., areas with a minority concentration of over 40%. (N. T. 51-136). Of the 8,235 total scattered site units operated by PHA, 6,747 are located in racially impacted areas. (Exhibit D-32).

1974, 90.8% of the persons residing in conventional housing projects (those units which were not scattered site) were non-White.[57] While one would expect that most PHA conventional projects would have a non-White population reflecting the Black population of the entire PHA low-income public housing system, four projects located in predominantly White areas of Philadelphia have a predominantly White tenant population. (N. T. 53-39, Exhibit D-26). 96.8% of the scattered site units in Philadelphia are populated by racial minorities, with, as pointed out above, 82% of these being located in racially impacted areas of the City. Furthermore, the clearance by PHA and RDA which took place on and around the Whitman site, coupled with the cancellation of the Whitman Park Townhouse Project, has reinforced segregation in Philadelphia. Because of the clearance, which led to the displacement of Blacks from a fairly integrated pocket in the Whitman area, Whitman has become more segregated than prior to governmental intervention.

The cancellation of the Whitman Park Townhouse Project had a racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia. The waiting list for low-income public housing in Philadelphia is composed primarily of racial minorities. Of the 14,000 to 15,000 people on the waiting list for public housing in Philadelphia, (N. T. 56-84), 85% are Black, and 95% are considered to be of racial minority background. (N. T. 40-103). Obviously those in housing projects, which are overwhelmingly Black, and those on the public housing waiting list, are those least able to move out of the poorer, racially impacted areas of Philadelphia. The evidence also established that Blacks in Philadelphia who are concentrated in the three major Black areas of Philadelphia,

57. Of the total 47,313 persons residing in conventional public housing projects as of 1974, 42,950 were non-White. (Exhibit D-28).

have the lowest median income in comparison with the total population of Philadelphia and live in the poorest housing in Philadelphia. The Whitman Park Townhouse Project was a unique opportunity for these Blacks living in racially impacted areas of Philadelphia to live in an integrated, non-racially impacted neighborhood in furtherance of the national policy enunciated in Title VIII of the Civil Rights Act of 1968. Public housing offers the only opportunity for these people, the lowest income Black households, to live outside of Black residential areas of Philadelphia. Cancellation of the project erased that opportunity and contributed to the maintenance of segregated housing in Philadelphia.

1) *City of Philadelphia*

We find that, in view of the pattern of racial segregation which prevailed in both private and public housing in Philadelphia, the City of Philadelphia has not, under the facts of this case, met its duty of affirmatively implementing the national policy of fair housing and has violated Title VIII of the Civil Rights Act of 1968. Initially, we find that the policy of the current administration to support local communities in their opposition to projects in their neighborhoods without consideration of the effect of such support or the basis of the opposition to the proposed project is contrary to the overriding national policy to further integregation in housing. *Banks v. Perk*, 341 F. Supp. 1175, 1179 (N. D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973). We do not intimate that local governmental officials should not be sensitive to the desires of their constituents on whose support they depend for election. However, in respecting the desires of the local communities, governmental officials are not free to ignore the law and override a national policy of fair housing as enunciated in Title

VIII of the Civil Rights Act of 1968. Further, the specific pledge of support by Mayor Rizzo to WAIC in their fight to stop the Whitman Park Townhouse Project encouraged that community not only to continue their opposition, but to amplify it.

Mayor Rizzo asserted in his testimony that his policy is racially neutral and that his actions are taken without a view toward any particular race. He candidly stated in connection with the potential effects of his action on racial minorities that:

> I would have to say that never entered my mind. But thinking it over, I would say there is a possibility that that might affect the minorities, that they might be shortchanged, but it would not change my position. (N. T. 42-83, 42-84).

Such "color-blindness" does not comply with the mandates of affirmative action required by Title VIII. *Shannon v. HUD*, 436 F. 2d 809 (3d Cir. 1970). Also Deputy Mayor Phillip Carroll, who was assigned by Mayor Rizzo to handle the Whitman controversy, testified that he was not aware of the racial composition of public housing in Philadelphia. (N. T. 25-49). Such unawareness or insensitivity to racial problems on the part of a public official does not comply with the affirmative duties imposed by Title VIII.

The City has consistently argued throughout this case that it does not build public housing and is under no duty to do so. However, the facts show that the cooperation of the City Administration is required to construct a housing program. Further, as the facts here graphically illustrate, the City was capable of preventing the construction of a public housing project which had been approved and was under construction.

The City had a duty to encourage and cooperate in the building of public housing which would foster fair housing. *Banks v. Perk, supra,* at 1185. However, the facts of this case establish that rather than cooperate in building the project, two City Administrations interfered with and accomplished the termination of its construction. This non-cooperation began with the Tate Administration's stated intention to refuse to supply Multicon with police assistance at the Whitman site and was manifested by the dispute over the building of fences and sidewalks. Opposition was further manifested by the City's attempts to halt construction, its encouragement of local opposition to the Whitman Park Townhouse Project, its efforts to obtain an injunction, its encouragement of a June 22, 1972 RDA resolution declaring the Multicon contract void *ab initio,* its action to keep HUD out of the Whitman controversy, and by eventually paying damages to Multicon rather than insisting that Multicon fulfill its contract. In view of the heretofore described racial segregation in housing in Philadelphia, we find that these activities do not comply with the affirmative action requirements of Title VIII, 42 U. S. C. § 3608(d)(5) and are in violation of that section.

The City argues that the threatened violence on the part of the citizens surrounding the Whitman project, should construction of the project have been permitted to resume, justified action on their part to halt construction of the Whitman Park Townhouse Project. However, it is well established that a history of tension or violence does not excuse the denial of civil rights. *Palmer v. Thompson,* 403 U. S. 217 (1971); *Cooper v. Aaron,* 358 U. S. 1 (1958); *Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N. D. Ill. 1969) *aff'd,* 436 F. 2d 306 (7th Cir. 1970), *cert. denied,* 402 U. S. 922 (1971).

2) *Redevelopment Authority of the City of Philadelphia*

RDA has, throughout the trial of this case, taken a position similar to that of the City of Philadelphia, i.e., that RDA does not build low-income public housing, and that therefore, they should not be held responsible for any actions taken in this "public housing" case. We find, however, that RDA was intimately involved in the construction of the Whitman Park Townhouse Project and in the entire Whitman Urban Redevelopment Area. RDA became enmeshed in the Whitman project as a result of the Barrett Amendment which allowed a writedown of the value of the land previously owned by PHA and permitted lower density housing to be built on the site. Thereafter, RDA entered into a construction contract with Multicon for construction of the Whitman Townhouse Project.

Since RDA was involved in the construction of a federally funded housing project, RDA had the same affirmative duty to achieve integration under 42 U. S. C. § 3608(d)(5) as did the City of Philadelphia. However, RDA did nothing to encourage the building of the Whitman Park Townhouse Project. Rather, RDA succumbed to the pressure to hinder construction and void the contracts between it and Multicon. On April 28, 1972, it passed a resolution authorizing its general counsel to take action in connection with any default by Multicon. Thereafter, on June 22, 1972, it took two unusual actions in connection with the Whitman Park Townhouse Project. First, in the lawsuit brought by WAIC, it withdrew its requested finding of fact which stated that it had met all the procedural legal requirements for building the Whitman Park Townhouse Project, a position it had steadfastly maintained throughout the trial. Second, it passed an unusual resolution declaring that its contract with Multicon was void *ab initio* for lack of citizen participation. These

actions were taken without any effort to have Multicon honor its construction contract and have the project constructed. Furthermore, RDA must be charged with the knowledge that its clearance procedures in connection with the Whitman Urban Renewal Area, combined with PHA's clearance for the Whitman site, led to more segregation in the area surrounding the Whitman Park Townhouse Project. This course of conduct, viewed in its context of a racially segregated city, does not comply with the affirmative duties required of RDA and is in violation of 42 U. S. C. § 3608(d)(5).

3) *Philadelphia Housing Authority.*

It is clear that PHA has an affirmative duty to integrate its housing projects and be instrumental in dispersing urban housing patterns. *Banks v. Perk*, 341 F. Supp. 1175 (N. D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973). As stated in *Banks, supra;*

> The Fair Housing Act of 1968, 42 U. S. C. § 3601 *et seq.*, in establishing a national policy of fair housing throughout the United States carried with it the clear implication that local housing authorities in conjunction with Federal agencies responsible for housing programs are to affirmatively institute action the direct result of which was to be the implementation of the dual and mutual goals of fair housing and the elimination of discrimination of that housing. 341 F. Supp. at 1182.

As noted herein, PHA maintains a racially segregated low-income public housing system. Although operating under a freedom of choice plan now, little if any progress has been made toward the integration of its housing system. Where a freedom of choice plan fails to achieve integra-

tion, but preserves the effects of past racial segregation, a more realistic plan must be developed. *Green v. County School Board of Kent County*, 391 U. S. 430 (1968); *Banks v. Perk, supra.*[58]

In connection with the Whitman Park Townhouse Project, the evidence establishes that PHA planned the project and cleared the area, creating a more racially segregated Whitman area. On April 28, 1972, in response to RDA's resolution of that day, PHA wrote RDA and stated that as of April 29, 1972, Multicon would be in default. This impending default was never communicated to Multicon. PHA has maintained throughout this litigation that it is ready to proceed with the Whitman Park Townhouse Project, which would be an affirmative step toward desegregation of its housing system. It has not done so. It has not proposed a plan, nor has it taken any action aimed at desegregating its racially segregated public housing system.[59] We find that PHA has not met its affirmative obligation under 42 U. S. C. § 3608(d)(5).

4) *Department of Housing and Urban Development*

We likewise find that HUD is liable under Title VIII of the Fair Housing Act, 42 U. S. C. § 3608(d)(5). The

58. In *Banks*, the Court stated that:

> Within the framework of their freedom of choice plan, CMHA must act as affirmatively as they can to act as real estate brokers to convince east side residents to move into scattered-site homes on the west side. CMHA and the Administration of the City of Cleveland are charged with the leadership of this proposal to integrate housing patterns in Cleveland. Since CMHA is charged with the building of public housing, it is their duty to devise appropriate policies and plans in this area. It is the obligation of the City to support CMHA, to encourage them in every way, and to aid in the integration of the housing patterns of the City with all its strength. 341 F. Supp. at 1185.

59. The failure of PHA to proceed on its own with the Whitman Park Townhouse Project may be strong evidence that the support of the City Administration is required for a housing program to proceed.

evidence is clear that HUD was aware that the other defendants were not in compliance with the Fair Housing Act of 1968 in their opposition to the Whitman Park Townhouse Project (N. T. 44-48, 45-20, 45-21, Exhibit P-113) and that there was racial motivation involved in the opposition to the project. (N. T. 44-48 to 44-52, Exhibit P-90). HUD was asked by Multicon on several occasions to intervene on behalf of Multicon to aid in constructing the project, but provided no assistance. (N. T. 35-43, 35-44, 4-44). Moreover, under HUD's own equal opportunity determination, Morton Addition, a project located in a Black racially impacted area of Philadelphia, was to be built only if construction proceeded with the Whitman Park Townhouse Project, which HUD determined met the equal opportunity guidelines. Morton Addition was built while Whitman, a project which would have furthered integration in Philadelphia, was not built. In short, HUD heeded the suggestion from Washington to keep a "low profile" in the dispute after the Rizzo Administration wrote its letter criticizing HUD to a member of President Nixon's White House staff. (N. T. 12-30 to 12-33, 45-21, 45-22). Keeping a "low profile" is not in keeping with the affirmative duty specifically placed upon HUD by the Fair Housing Act of 1968. *Shannon v. HUD*, 436 F. 2d 809 (3d Cir. 1970). HUD failed to use the resources of the federal government in an effort to have the Whitman Park Townhouse Project constructed. We find that HUD has not met its affirmative obligation under 42 U. S. C. § 3608(d)(5).

b) Racial Effect.

Plaintiffs contend that proof that the action of the governmental defendants had a racially discriminatory effect, makes out a prima facie case of a violation of Title VIII of the Civil Rights Act of 1968 and thereby shifts the

burden to the defendants to show a compelling governmental interest justifying their action. Prior to, and during the trial of this case, plaintiffs also contended that proof of governmental actions having a racially discriminatory effect would likewise establish a cause of action under the Fifth, Thirteenth and Fourteenth Amendments as well as 42 U. S. C. §§ 1981 and 1983. However, in *Washington v. Davis*, — U. S. —, 96 S. Ct. 2040 (1976), the Supreme Court held that a disproportionate racial effect was not sufficient by itself to establish a constitutional violation under the Equal Protection Clause in an employment discrimination case. The Supreme Court distinguished Title VII liability and the standard of proof thereunder, from the standard of proof required to establish a constitutional violation, under which the plaintiffs were required to show a discriminatory purpose on the part of the defendants. Plaintiffs have conceded that the holding of *Washington* requires them to abandon their contention that disproportionate racial effect is sufficient to establish a prima facie case in connection with the constitutional violations they allege. *See Washington v. Davis*, — U. S. —, 96 S. Ct. 2040, 2050 (1976). We agree with the plaintiffs, however, that the prima facie case concept applicable to cases brought pursuant to Title VII of the Civil Rights Act of 1964 is for the reasons hereinafter discussed, applicable to violations of Title VIII of the 1968 Act.[60]

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60. Nothing in *Washington* undermines the racial effect standard for Title VII cases enunciated in Griggs v. Duke Power Co., 401 U. S. 424 (1971). *See* – U. S. –, 96 S. Ct. 2040, 2047, n. 10 (1976). In *Griggs*, Chief Justice Burger stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U. S. at 431.

The Fair Housing Act proscribes a wide range of discriminatory housing practices by both public and private parties. These acts range from a party's outright refusal to rent or sell on the basis of race to discrimination in terms and conditions of housing which will "otherwise make unavailable or deny" a dwelling on racial grounds. *See* 42 U. S. C. §§ 3604(a), 3604(b), 3605, 3606. The Supreme Court has noted that "[t]he language of the Act is broad and inclusive" and requires a "generous construction." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 209, 212 (1972). Lower Courts have also agreed that the Act is to be liberally construed in accordance with the national policy in favor of fair housing. *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 548 (W. D. Va. 1975); *Zuck v. Hussey*, 394 F. Supp. 1028, 1047 (E. D. Mich. 1975); *United States v. Real Estate Development Corp.*, 347 F. Supp. 776, 781 (N. D. Miss. 1972). Moreover, it is well established that "civil rights statutes should be read expansively in order to fulfill their purpose." *Mayor v. Ridley*, 465 F. 2d 630, 635 (D. C. Cir. 1972) (Wright, J., concurring) citing *Griffin v. Breckenridge*, 403 U. S. 88, 97 (1971). We have heretofore discussed the legislative history of the Act which shows that in enacting the Fair Housing Act, Congress was aware that its past attempts to end racial discrimination in housing had failed and that affirmative action was required. Furthermore, the legislative history of the Fair Housing Act demonstrates that Congress was aware of the proof problems inherent in establishing racial intent. During debate on the Act, Senator Baker introduced an amendment which would have exempted from liability any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . or an intention to make any such preference . . . ." 114 Cong.

Record 5214. Senator Percy opposed the amendment stating that:

> If I understand this amendment, it would require proof that a single homeowner had specified racial preference. I maintain that proof would be impossible to produce. 114 Cong. Record 5216.

The amendment was rejected by the Senate.

Prior to the Supreme Court's recent decision in *Washington*, it was well established that the racial effect test was applicable to Title VIII of the Civil Rights Act of 1968. In *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied*, 422 U. S. 1042 (1975), the Eighth Circuit held that Title VIII was designed to remove artificial barriers in housing and that proof of racial intent was not required under the Act. 508 F. 2d at 1184. The court then stated that:

> The burden of proof in Title VIII cases is governed by the concept of the "prima facie case." To establish a prima facie case of racial discrimination the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone . . . .
>
> Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendants to demonstrate that its conduct was necessary to promote a compelling governmental interest. 508 F. 2d at 1184-1185. (Footnotes and citations omitted).

Earlier the same court, in *Williams v. Mathews Co.*, 499 F. 2d 819 (8th Cir.) *cert. denied*, 419 U. S. 1021 (1974) stated in connection with Title VIII that:

> The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictably result in racial discrimination, irrespective of defendant's motivation. 499 F. 2d at 826.

Other courts have held that the prima facie case concept applies to Title VIII and that effect and not motivation governs such cases. *United States v. Pelzer Realty Co., Inc.*, 484 F. 2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U. S. 936 (1974); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F. 2d 799, 808 (5th Cir. 1974); *Barrick Realty, Inc. v. City of Gary*, 491 F. 2d 161 (7th Cir. 1974); *United States v. Real Estate Development Corp.*, 347 F. Supp. 776, 782 (N. D. Miss. 1972); *Zuck v. Hussey*, 394 F. Supp. 1028, 1047 (E. D. Mich. 1975); *United States v. Hughes Memorial Homes*, 396 F. Supp. 544, 548 (W. D. Va. 1975). Likewise, in *Shannon v. HUD*, 436 F. 2d 809 (1970), our Third Circuit stated that Title VIII required that HUD "look at the effects of local planning action . . . to prevent discrimination in housing resulting from such action." 436 F. 2d at 816. These cases, read in light of the legislative history of Title VIII and its remedial purpose convince this Court that the racial effect test and the prima facie case concept continue applicable to actions brought pursuant to Title VIII of the Civil Rights Act of 1968.

An analysis of the facts relevant to this theory of liability in connection with the governmental defendants need not detain us long. As stated herein, there is no question that the actions of these defendants in terminating the Whitman Park Townhouse Project had a racially discriminatory effect. Our analysis in connection with this

finding is found at page A59 of this opinion and need not be repeated here. As pointed out herein, it is clear from this record that the actions of the City of Philadelphia, RDA and PHA in terminating the Whitman Park Townhouse Project, taken against the background of racial segregation in Philadelphia and in the PHA system, had a disparate racial effect. *Wright v. Council of City of Emporia,* 407 U. S. 451 (1972).

Having established that the actions of the City, RDA and PHA in terminating the Whitman Park Townhouse Project had a racially discriminatory effect, the burden shifted to the defendants to establish a compelling governmental interest which would justify such action. The only justification advanced by any party for the action taken by the defendants was that of the City. The City argued that its actions in terminating the project were required because of threatened violence. The United States Supreme Court has consistently held that threats of violence or unrest by some citizens cannot justify depriving those of minority background of their constitutional rights. *Cooper v. Aaron,* 358 U. S. 1 (1958). "Citizens may not be compelled to forego their constitutional rights because officials fear public hostility . . . ." *Palmer v. Thompson,* 403 U. S. 217, 226 (1971) (dictum). *See Wright v. Georgia,* 373 U. S. 284, 293 (1963); *Buchanan v. Warley,* 245 U. S. 60 (1916). Moreover, we note the excellent record that the Civil Disobedience Unit of the Police Department of the City of Philadelphia has established in connection with potential disruptions of the peace. Indeed, in this case Inspector Fencl, the able head of the Civil Disobedience Unit, testified that the Philadelphia Police Department could control any disturbance in connection with the Whitman Park Townhouse Project and could have seen that construction was completed. (N. T. 49-146, 49-147).

We find that the plaintiffs have established that the actions of the City of Philadelphia, RDA and PHA had a racially discriminatory effect which was not justified by any compelling governmental interest, and constitute a violation of Title VIII of the Civil Rights Act of 1968.

c) Racial Intent.

It is, of course, beyond question that the denial of housing with a racial purpose or motivation is illegal. If such racially motivated actions are taken by an official of a governmental body, those actions violate the Thirteenth and Fourteenth Amendments as well as 42 U. S. C. §§ 1981 and 1982. Further, a governmental agency which denies housing on the basis of race violates 42 U. S. C. § 2000(d) *et seq.*, and 42 U. S. C. § 3601 *et seq.* Private action denying housing on the basis of race violates 42 U. S. C. §§ 1981 and 1982. *Runyon v. McCrary*, 44 U. S. L. W. 5034 (June 25, 1976); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Gatreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N. D. Ill. 1969), *aff'd* 436 F. 2d 306 (7th Cir. 1970), *cert. denied*, 402 U. S. 922 (1971). Although it is not enough to establish racial discriminatory purpose to show solely that actions taken had a racially discriminatory impact, "disproportionate [racial] impact is [not] irrelevant" to prove an invidous discriminatory purpose which "may often be inferred from the totality of the relevant facts." *Washington v. Davis*, — U. S. — , 96 S. Ct. 2040, 2048, 2049 (1976). Mr. Justice Stevens, concurring in *Washington* states succinctly the role that proof of the ultimate consequences of actions plays in determining racial motivation:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of

> mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. — U. S. — , 96 S. Ct. at 2054.

With these principles in mind we will proceed to analyze the proof of racial motivation of WAIC and the City of Philadelphia.

1) *Whitman Area Improvement Council.*

We find that the evidence does not support a finding that the opposition to the Whitman Townhouse Project by WAIC was substantially racial.[61] We make this finding, although we are well aware that many of the comments made by the demonstrators and picketers at the Whitman site and at WAIC meetings displayed racial bias toward the potential residents of the Whitman Park Townhouse Project. (N. T. 33-106, 33-118, 34-4, 34-6, 17-73, 49-126, 49-130, 21-10). At trial, some witnesses from the Whitman Area who were members of WAIC testified that they were opposed to the Whitman project because it would move Blacks into the neighborhood and would lead to mixed marriages. (N. T. 54-91, 54-92, 28-13, 28-14, 28-15, 28-85). Furthermore, we find that some of the reasons given by WAIC for its opposition to the Whitman Park Townhouse Project lack substance. *Banks v. Perk,*

61. All residents within the boundaries of the Whitman Urban Renewal Area are members of WAIC.

341 F. Supp. 1175, 1178-79 (N. D. Ohio 1972) *aff'd in part, rev'd in part on other grounds,* 473 F. 2d 910 (6th Cir. 1973). Early in the planning stages for the Whitman Park Townhouse Project, WAIC opposed the project because of its design. However, a special Amendment of Congress was passed to accommodate a change in design from high-rise to low-rise construction. After these changes were made, PHA and Multicon made other design changes, including back alleys, a change in windows for fire safety and creation of a recreation area, which met the objections of WAIC. WAIC also opposed the project because they felt that all housing projects were inherently unsafe and unsanitary. However, they presented no evidence to justify such a finding. Indeed, the Whitman Park Townhouse Project was sufficiently unique in its low-rise design and home-ownership features to destroy any generalization about all housing projects. Also, PHA agreed to allow a screening committee, which would include WAIC members, to screen the prospective occupants of the Whitman Townhouse Project. WAIC also opposed the project because persons with low incomes, making no down payments, would be able to live in homes allegedly more expensive than theirs, i.e., that those who were to live in the Whitman Park Townhouse Project were "getting something for nothing." This record reveals that the Whitman community received and accepted over $11 million in urban renewal funds and over $2.7 million in rehabilitation loans and grants over a ten-year period. (N. T. 2-21, 57-22). It is difficult to accept WAIC's purported opposition to low-income minority citizens receiving benefits, while they themselves were a leader in the nation in terms of funds given to an urban renewal area. (N. T. 20-17). Moreover, it is well established as a matter of law that in the area of economic and social welfare, a governmental body need not treat all groups identically

so long as its distinctions are rationally based. *Dandridge v. Williams*, 397 U. S. 471 (1970). Finally, WAIC opposed the Whitman Park Townhouse Project because it claimed insufficient citizen participation by it in the decision to build. However, the evidence clearly establishes that WAIC participated in all stages of the Whitman Park Townhouse Project.

2) *The City of Philadelphia.*

It is clear from the testimony that certain officials of the City were aware of the existence of some racially motivated opposition to the Whitman Park Townhouse Project. The evidence is uncontradicted that Mayor Rizzo, both before and after taking office in January of 1972, considered public housing to be Black housing and took a stand against placing such housing in White neighborhoods. Further, the City must be charged with knowledge of the fact that, as pointed out herein, the cancellation of the Whitman Park Townhouse Project had an obvious disparate effect on the Black community and that the natural consequences of the action taken by the City would be to produce that disparate impact. *Washington v. Davis*, — U. S. —, 96 S. Ct. 2040, 2054 (1976) (Stevens, J., concurring). Acting with such intent constitutes violation of the Thirteenth and Fourteenth Amendments and the Civil Rights statutes enumerated herein.

The Remedy.

The evidence in this case establishes that certain defendants have committed both constitutional and statutory violations in connection with the stoppage of construction of the Whitman Park Townhouse Project. As the facts outlined herein establish, this action was taken against a background of racial segregation both in the City of Phila-

delphia and in the housing system of PHA. The Whitman Park Townhouse Project would have been a step by the governmental defendants toward the desegregation of both the City of Philadelphia and the PHA system and would have been in conformance with the governmental defendants' statutory obligation under Title VIII to take affirmative action to achieve fair housing. Further, as set out herein, halting the Whitman Park Townhouse Project led to further segregation in the Whitman Area while perpetrating racial segregation in Philadelphia and the PHA system.

Federal District Courts have broad equitable powers to remedy constitutional violations. *Hills v. Gautreaux*, — U. S. —, 96 S. Ct. 1538 (1976). We see no reason why these same equitable powers should not apply to violations of the affirmative duties imposed by the Civil Rights Act of 1968, 42 U. S. C. § 3601, *et seq.*, which was passed in part in an effort to enforce the Thirteenth and Fourteenth Amendments as well as the Commerce Clause of the U. S. Constitution, *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied*, 422 U. S. 1042 (1975); 114 Cong. Record 2273. As stated by the United States Supreme Court in an oft-quoted citation:

> Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

Indeed, when faced with a civil rights violation, a United States District Court has not merely the power but the duty "to remedy the effects of past violations as well as bar similar violations in the future." *Louisiana v. United*

States, 380 U. S. 145, 154 (1965). Of course, equitable powers may be exercised only on the basis of a found violation. *Rizzo v. Goode*, — U. S. —, 96 S. Ct. 598 (1976); but once a violation is found all reasonable methods are available to formulate an effective remedy to achieve the greatest possible degree of relief given the practicalities of the situation. *Hills v. Gautreaux*, — U. S. —, 96 S. Ct. 1538, 1546 (1976). Injunctive relief must be framed to remedy the wrong claimed by the party and narrowly tailored to remedy the specific harm shown. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 410 (1945); *Davis v. Romney*, 490 F. 2d 1360, 1370 (3d Cir. 1974). In trying to formulate appropriate guidelines to guide United States District Courts in connection with the tailoring of equitable relief, the United States Supreme Court has stated that:

> [W]ords are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern . . . . *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 31 (1971).

In housing discrimination cases the federal courts have consistently shown their willingness to exercise their broad equitable powers to remedy constitutional and statutory violations. *See, e.g., Dailey v. City of Lawton*, 425 F. 2d 1037 (10th Cir. 1970) (order requiring the issuance of building permits); *Banks v. Perk*, 341 F. Supp. 1175 (N. D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973) (enjoining the City from planning or building any future public housing in Black neighborhoods); *Hills v. Gautreaux*, — U. S. —, 96 S. Ct. 1538 (1976) (ordering defendants to submit a comprehensive plan to remedy the segregated public housing

system in the City of Chicago); *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974) *cert. denied*, 422 U. S. 1042 (1975) (permanent injunction restraining officials from enforcing a zoning ordinance which had precluded the building of low and moderate income housing project); *Garrett v. City of Hamtramck*, 335 F. Supp. 16 (E. D. Mich. 1971), *aff'd in part and rev'd in part*, 503 F. 2d 1236 (6th Cir. 1974).

In fashioning appropriate equitable relief in this case, the Court does not wish to become a "housing czar" in the City of Philadelphia, nor does it intend to appropriate the role of the legislative bodies whose proper function it is to pass legislation and establish local policy in connection with public housing. It is not the Court's intention to inject itself into the internal affairs of the defendants by controlling low-income public housing in Philadelphia. We are well aware of the Supreme Court's admonition in *Rizzo v. Goode*, — U. S. —, 96 S. Ct. 598, 607 (1976), that "federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Where injunctive relief is sought, the principles of equity, comity and federalism must restrain a federal court where the injunctive relief is sought against those in charge of the executive and legislative branch of local government such as the defendants in this case. 96 S. Ct. at 608.

The plaintiffs in this case have asked this Court to order the defendants to build the Whitman Park Townhouse Project as planned. The defendants, however, have argued that the project should not be built as planned but that, if this Court finds liability, it should order the defendants to spend the funds initially appropriated for construction of the project on "scattered site" housing in the

City of Philadelphia. They have presented convincing arguments that scattered site housing will be more effective than the traditionally large housing project in accomplishing racial integration. Apparently, the City of Philadelphia now has a policy of obtaining scattered sites and rehabilitating them for public housing rather than building the traditionally large public housing project. Although the Court is inclined to agree that "scattered site" housing may be more effective in accomplishing racial integration than a large public housing project, we are of the opinion that on the basis of this record the Court must order the building of the Whitman Park Townhouse Project as originally planned.

Where specific projects have been planned, and racial discriminatory conduct has precluded the development of the project, the courts have consistently enjoined the discriminatory conduct and ordered the project built. For example, in *U. S. v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied*, 422 U. S. 1042 (1975), the Court held that under Title VIII of the 1968 Fair Housing Act a local ordinance had a racially discriminatory effect in preventing a low and moderate income housing project in a White area from being built. The Court enjoined the enforcement of the ordinance so the planned project could be built. In *Dailey v. City of Lawton*, 425 F. 2d 1037 (10th Cir. 1970), the Circuit Court affirmed the district court's order requiring a building permit to be issued so that a low income housing project could be built. The district court had found that the denial of the building permit for a housing project in a White area was racially discriminatory and ordered that this bar to the project (denial of permit) be removed in order for the project to be built. In *Banks v. Perk*, 341 F. Supp. 1175 (N. D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F. 2d 910 (6th Cir. 1973), the district court held that the

revocation of building permits for the building of public housing projects in White areas was racially discriminatory and ordered the issuance of "all necessary building permits to enable the prompt commencement of construction of the planned public housing units." *Banks, supra,* 341 F. Supp. at 1180. Moreover, in *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach,* 493 F. 2d 799 (5th Cir. 1974), the court held that the City of Delray Beach's refusal to allow a proposed low-income housing project to tie into its existing water and sewer systems was racially discriminatory and ordered the City to allow the project to tie into the water system so that the housing project could proceed. In each of the above cases, a planned low or moderate income housing project was stopped in its planning stages because of a zoning ordinance, a refusal to grant building permits and a refusal to be allowed to be tied into a water line. In each case, the court found the impediment to the project to be racially discriminatory and ordered it to be removed so that the project could be built.

It was the failure of the defendants to build the Whitman Park Townhouse Project and the defendants' actions in connection therewith which we have found to be in violation of the Constitution and Title VIII of the Civil Rights Act of 1968. Such violations empower this Court to order the defendants to immediately proceed with the construction of the Whitman Park Townhouse Project.

The building of the Whitman Park Townhouse Project will, at a minimum, lead to the re-establishment of the racial balance which existed in the Whitman area prior to the clearance which took place by both PHA and RDA in connection with the planning of the Whitman Park Townhouse Project and the Whitman Urban Renewal Area. As noted herein, prior to the clearance by PHA and RDA, the area set aside for the Whitman Park Townhouse

Project was fairly well integrated, but because of the clearance, the area became more segregated. In light of the present racial composition of public housing in Philadelphia and the waiting list for public housing, building the project as proposed can be expected to re-establish the racial balance in the area of the Whitman project.

The proposed Whitman Park Townhouse Project has many characteristics which make it unique and are designed to avoid the problems which have accompanied the traditional housing project. First, the proposed project is of a low-rise townhouse design with a low density for a public housing project. Such design will fit comfortably in the context of the surrounding area, which is predominantly row houses of similar design. Also, the project is designed so that the occupants can eventually obtain ownership of their homes. This unique feature is designed to encourage proper maintenance and care of the units which have been problems in the traditional high-rise project.

There was testimony concerning the potential racial composition of the Whitman Park Townhouse Project. All parties stated their concern that the Whitman Park Townhouse Project should not have an all-Black population which would create an island of Black people surrounded by a sea of White people. It is for this reason that all the parties in this litigation have suggested that the project should be integrated. Indeed, the experts testifying for both plaintiffs and defendants agreed that the occupancy of the Whitman Park Townhouse Project should not be overwhelmingly Black. (N. T. 41-98, 41-99, 52-128, 52-129, 53-82).

We find that the present policies of PHA which it characterizes as a "freedom of choice" plan have not only failed to accomplish integration but have perpetuated

racial segregation. The Court will therefore order PHA to submit a proposal concerning the racial composition for the Whitman Park Townhouse Project when constructed, together with a plan which will further integration in all public housing projects within the City of Philadelphia.

The plaintiffs have asked this Court to order the governmental defendants to provide all necessary funds to complete the original project as planned. The delay in building the project has, in all probability, increased the cost of its construction. The original reservation of funds may well be inadequate to complete construction. Since the delay is the result of the unlawful actions of the defendants, the plaintiffs should not suffer a decrease in the number of housing units originally planned. This Court shall order the defendants to take all necessary steps to build the project as originally planned by using the funds now held in reserve by HUD and providing such additional funds as may be necessary.

Finally, plaintiffs have asked this Court to order the defendants to pay attorneys' fees arising out of this litigation. While plaintiffs may be entitled to an award of attorneys' fees the issue has not been briefed. *See, Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975); *Skehan v. Board of Trustees of Bloomsburg State College,* No. 73-1613 (3d Cir. June 21, 1976). Furthermore, plaintiffs have not submitted evidence in connection with reasonableness of any fees claimed. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 487 F. 2d 161 (3d Cir. 1973); *Pitchford v. Pepi, Inc.,* 531 F. 2d 92, 109 (1975).

This Memorandum and Order is in lieu of findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Accordingly, the following Order is entered:

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1575

RESIDENT ADVISORY BOARD, et al.

v.

FRANK L. RIZZO, et al.

Order.

AND Now, this 5th day of November, 1976, it is hereby ORDERED as follows:

(1) The defendants Philadelphia Housing Authority, Redevelopment Authority for the City of Philadelphia, City of Philadelphia, Department of Housing and Urban Development, their officers, agents, and employees shall immediately take all necessary steps for the construction of the Whitman Park Townhouse Project as planned.

(2) PHA shall submit to this Court within ninety days a plan for the racial composition of the Whitman Park Townhouse Project.

(3) PHA shall present to this Court within ninety days a plan concerning the tenanting of all public housing projects within the City of Philadelphia which will further racial integration.

(4) All parties to this litigation are enjoined from taking any action which will interfere in any manner with the construction of the Whitman Park Townhouse Project.

/s/ R. J. BRODERICK
Raymond J. Broderick, *J.*

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING MOTIONS FOR A NEW TRIAL.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1575

RESIDENT ADVISORY BOARD et al.

v.

FRANK L. RIZZO et al.

Order.

AND NOW, to wit, this 10th day of December, 1976, the Court, having entered findings of fact and conclusions of law on November 5, 1976, certain post-trial motions having been filed, the Court, having reviewed the record, findings of fact and conclusions of law, rules as follows with respect to said motions:

It is hereby ORDERED that:

1. The motion of the City of Philadelphia to amend findings of fact and the Court's judgment is DENIED.

2. The motion of the City of Philadelphia for a new trial is DENIED.

3. The motion to amend and supplement findings of fact and conclusions of law filed by defendant, Redevelopment Authority of the City of Philadelphia, is GRANTED to the extent that the finding of fact found at pages 33-4 of the Memorandum and Order that "Multicon received no

response from RDA in connection with its July 25 letter as to whether it should cure its alleged default. (N. T. 4-86)." is amended to read, "Multicon received no instructions from RDA as to whether RDA then desired Multicon to proceed to cure any default, but its July 25 letter was responded to by Mr. Katz of RDA on July 28, 1972, and Mr. Katz expressed a willingness to meet with Multicon in order to explore the possibility of an amicable settlement. (N. T. 8-5, 8-6)." The balance of the motion is DENIED.

4. The motion for a new trial filed by defendant, Philadelphia Housing Authority, is DENIED.

5. The motion to amend findings of fact, conclusions of law and judgment filed by defendant-intervenor, Whitman Area Improvement Council, is DENIED.

6. The motions of the City of Philadelphia, the Redevelopment Authority of the City of Philadelphia, and the Philadelphia Housing Authority to stay execution of this Court's judgment pending decision on these post-trial motions are DENIED because they are moot.

/s/ R. J. BRODERICK
Raymond J. Broderick, *J.*

12/13/76

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1241, 77-1242,
77-1243 & 77-1245

RESIDENT ADVISORY BOARD by ROSE WYLIE, Trustee ad litem, 1310 Arch Street

and

HOUSING TASK FORCE OF THE PHILADELPHIA URBAN COALITION by SHIRLEY DENNIS and JOSEPH MILLER, Trustees ad litem, 1512 Walnut Street, Philadelphia, Pennsylvania

and

ESTHER SIERRA MENDEZ, individually and as guardian ad litem for her children, Carmelo, Mariel and Juanita, 1811 North 17th Street, Philadelphia, Pennsylvania

and

JEAN THOMAS, individually and as guardian ad litem for her children, Cheryl, James, Kevin and Byris Thomas, 3855 Mt. Vernon Street, Philadelphia, Pennsylvania

and

MABLE SMITH, individually and as guardian ad litem for her children, Jerome, Vanessa and Janice Smith, 2429 North 27th Street, Philadelphia, Pennsylvania

and

BERNICE DEVINE, individually and on behalf of her children Robert, Linda and Arthur Devine, Apt. 809-C, Warnock Place, Richard Allen Homes Philadelphia, Pennsylvania,

on their own behalf and on behalf of all persons on the waiting list for public housing in the City of Philadelphia, Pennsylvania

v.

FRANK RIZZO, individually and in his capacity as Mayor of Philadelphia, City Hall, Philadelphia, Pennsylvania

and

HILLEL LEVINSON, individually and in his capacity as Managing Director of the City of Philadelphia, Municipal Services Building, Philadelphia, Pennsylvania

and

JAMES H. J. TATE, individually

and

FRED T. CORLETO, individually

and

MULTICON CONSTRUCTION CORP., 4645 Executive Drive, Columbus, Ohio

and

MULTICON PROPERTIES, INC., 4545 Executive Drive, Columbus, Ohio

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, City Hall Annex, Philadelphia, Pennsylvania,

Defendants

and

WHITMAN AREA IMPROVEMENT COUNCIL, ALICE MOORE, FRED DRUDING, and ALL MEMBERS OF WHITMAN AREA IMPROVEMENT COUNCIL AND ITS OFFICERS, AGENTS, SERVANTS, REPRESENTATIVES and EMPLOYEES, and ALL OTHER PERSONS ACTING IN CONCERT WITH THEM OR OTHERWISE PARTICIPATING IN THEIR AID,

Defendant-Intervenors

and

PHILADELPHIA HOUSING AUTHORITY, 2012 Chestnut Street, Philadelphia, Pennsylvania

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, City Hall Annex, Philadelphia, Pennsylvania

and

RUSSELL BYERS, individually and as Regional Administrator of the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania

and

CARLA A. HILLS, individually and as Secretary of the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania

and

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania,

Third Party Defendants

THE PHILADELPHIA HOUSING AUTHORITY, Appellant in 77-1241

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Appellant in 77-1242

WHITMAN AREA IMPROVEMENT COUNCIL, FRED DRUDING and all others acting in concert therewith, Appellants in 77-1243

FRANK L. RIZZO, HILLEL S. LEVINSON, the CITY OF PHILADELPHIA, et al.,

Appellants in 77-1245

(D.C. Civil No. 71-1575)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 6, 1977

BEFORE: WEIS, *Circuit Judge*, CLARK,* *Associate Justice* and GARTH, *Circuit Judge*.

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* The Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States (Retired), sitting by designation, heard the oral argument and participated in the decision in this case but died before the opinion was written.

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Opinion of the Court.

(Filed August 31, 1977)

GARTH, *Circuit Judge*

Plaintiffs, various individuals eligible for low-income public housing in Philadelphia and organizations with a membership interested in such housing, seek relief in this civil rights action against the City of Philadelphia, the City's housing authority ("PHA"), and its redevelopment authority ("RDA"), and the Department of Housing and Urban Development ("HUD"). The dispute centers upon

a plot of land in South Philadelphia which was condemned and cleared as a site for low-income public housing in 1959, and which has remained vacant since then. The district court found that the four governmental defendants had committed violations of various constitutional and statutory duties, 425 F. Supp. 987 (E. D. Pa. 1976). The court ordered injunctive relief as follows: (1) the government defendants were ordered to "take all necessary steps" for the construction of the planned project; (2) PHA was ordered to formulate a plan for the racial composition of the project when built and tenanted; (3) PHA was ordered to formulate a plan to further the integration of all Philadelphia public housing projects; and (4) all parties [1] were enjoined from interfering with the construction of the project. All defendants except HUD have appealed.

We affirm the district court's finding that, in delaying and frustrating the construction of the project, the City of Philadelphia acted with discriminatory intent and thereby violated plaintiffs' constitutional and statutory rights. We also affirm the finding that PHA and RDA have violated Title VIII of the Civil Rights Act of 1968 in failing to carry out the construction of the project; however, we affirm not on the ground relied upon by the district court [2]

1. The Whitman Area Improvement Council, its officers and members ("WAIC") were permitted to intervene as defendants by a district court order dated July 6, 1971. App. at 1A.

In addition to the named parties, briefs of the following amici curiae were filed:

United States, Housing Association of Delaware Valley and Fellowship Commission, Pennsylvania Human Relations Commission, and the National Commission Against Discrimination in Housing, Inc.

2. *See* PAAC v. Rizzo, 502 F. 2d 306, 308 n. 1 (3d Cir. 1974), *cert. denied*, 419 U. S. 1108 (1975); *cf.* California Bankers Ass'n v. Shultz, 416 U. S. 21, 71 (1974) (appellees who obtained relief in District Court "are free to urge in [the Supreme] Court reasons for affirming the judgment of the District Court which may not have been relied upon by the District Court.")

(that the agencies were liable for not acting affirmatively to end racial discrimination as mandated by § 3608(d)(5) of the Act, 42 U. S. C. § 3608(d)(5)), but on the ground that their activities in clearing the site "[made] unavailable or [denied] a dwelling to . . . person[s] because of race" within the meaning of 42 U. S. C. § 3604(a).

We therefore affirm those sections of the district court order directing the construction and tenanting of the project at issue (parts (1) and (2)). We also affirm so much of part (4) of the order as enjoins interference with the project's construction by the governmental defendants, but we vacate so much of that paragraph which enjoins the Whitman Area Improvement Council ("WAIC"). Because we can find no basis for the far-reaching equitable relief granted against PHA with respect to *all* public housing in Philadelphia, we also vacate part (3) of the district court's order.

I.

A. *Facts.*

The focal point of this dispute is the Whitman Urban Renewal Area ("Whitman") in South Philadelphia. Within the Whitman Urban Renewal Area is the site of the project (henceforth "Whitman project") which is at issue here. Like other neighborhoods in urban America, Whitman has undergone a transformation in its racial composition over the past several decades. Unlike most, however, Whitman has changed from an originally racially mixed area to one which is virtually all-white. Moreover, this change has resulted almost wholly from the urban renewal efforts of the defendant governmental agencies.

As revealed by the district court's analysis, Whitman's present all-white population must be viewed against a backdrop of, on the one hand, a growing concentration

of blacks and other minorities in discrete, insular sections of Philadelphia (North Philadelphia, West Philadelphia and South Central Philadelphia), and on the other, a reduction in the number of blacks residing in other parts of the city, including Whitman. The net result has been, in the words of the district court, that "[t]he City of Philadelphia is today a racially segregated city." 425 F. Supp. at 1006.

This litigation involves not the city as a whole, however, but only the Whitman Urban Renewal Area for which the public housing at issue was planned. That area is a residential area consisting of block upon block of two-story row houses. Prior to the postwar concentration of blacks in the three sections of Philadelphia previously mentioned (North, West, and South Central Philadelphia), a substantial number of black residents could be found in Whitman's row houses. Still, a trend away from a dispersed black population throughout Philadelphia—and, by inference, a trend away from an integrated Whitman—was evident as early as 1940. That year's census revealed a decline of about 300 blacks from the population of Whitman. 425 F. Supp. at 1009. As late as 1950 though, a number of black households were to be found in the southeast and northwest corners of this area. Indeed, 75 black families lived in the southeast corner alone, Exhibit P-168. Of this number 52 families lived in a five-square-block area that would be leveled during 1959-60 in the initial phase of urban renewal in Whitman. As found by the district court, these 52 households constituted "46% of the families living [in this five-block area], which made this area an integrated section of Philadelphia." 425 F. Supp. at 1009.

Though integrated, Whitman was also somewhat dilapidated—although subsequent developments were to show that the existing housing stock, *i.e.*, the two-story row

houses, could be salvaged through renovation. In the mid-1950's, however, renewal meant something other than renovation or restoration: renewal meant the razing of existing structures and the construction of "public housing" high-rise buildings. Thus when urban renewal came to Whitman in 1959-60, the integrated, five-block site mentioned above [3] was cleared of its residents, and its structures were leveled. The cleared site has remained virtually untouched, and without building construction, since that time.

Such, of course, was not the plan. The Philadelphia Housing Authority ("PHA") acquired the site through condemnation during 1959 and 1960, with the intention of constructing low-income public housing. After hearings PHA obtained necessary approvals both from the Philadelphia City Planning Commission and, in 1957, from the Department of Housing and Urban Development ("HUD").[4] On June 26, 1960, demolition contracts were awarded, and shortly thereafter the site was cleared.

The 1960 census tract reflects the impact of PHA's renewal efforts. With site clearance underway, only four black families were to be found within the five-block project site. 425 F. Supp. at 1009.[5] To quote the district court, PHA action "had the effect of removing some of the Black families who lived on the Whitman site." *Id.* at 995.

Thus by 1960 the ongoing clearance of the Whitman project site had worked substantial changes in the racial

3. The site is an area "bounded by Porter Street to the north, Oregon Avenue to the south, Front Street to the east, and midway between Second Street and Hancock on the west." 425 F. Supp. at 1009.

4. On December 6, 1957, HUD agreed to an "annual contributions contract" for the project in the amount of $8,607,793.

5. To a certain extent this decrease in the number of black families living in the Whitman project area was offset by a slight increase in the number of black households living in the blocks adjacent to the project site.

composition of the southeast section of Whitman, an area that had previously been integrated to the extent of having 46% black families. Condemnation and demolition had forced some black families to move out of Whitman, while others had relocated in the blocks adjacent to the project site (N. T. 31-147). By 1970, however, not one black family was to be found in the entire southeast corner of Whitman (Exhibit P-170). Indeed, the 1970 census revealed that only 100 blacks remained in the Whitman Urban Renewal Area as a whole (down from 200 in 1960 and from 400 in 1950 (N. T. 31-70)), and these families were concentrated in the northwest section of Whitman.

PHA's original plan for the Whitman site called for the development of a low-income project ("Delaware Towers"), which would consist of four high-rise apartment buildings. Because this plan, if implemented, would have required additional annexation of two small parcels of land, PHA held a public hearing on January 12, 1961. 425 F. Supp. at 987. Local opposition to high-rise, low-income housing on the Whitman site surfaced at this hearing, and, although the additional annexation was approved, community opposition to the construction of high-rise public housing on the Whitman site intensified. The high-rise opponents formed the Whitman Area Improvement Council to continue their fight. 425 F. Supp. at 995. Subsequently, Congress enacted the Housing Act of 1964, which included as § 1007 of that Act the so-called Barrett Amendment, which produced a change in the design of the Whitman project from high-rise towers to one- and two-family home construction. *See* 425 F. Supp. at 996. Thus, five years after condemnation and clearance of the Whitman project site by PHA, planning for the site had to begin anew.

The shift away from high-rise construction brought a new city agency into the planning process for the Whitman

site—the Redevelopment Authority of Philadelphia (RDA). RDA had earlier become involved in Whitman when, on October 27, 1963, it sought federal approval for the Whitman Urban Renewal Area. RDA's original plan involved razing an additional 103 homes in Whitman and rehabilitating 2500 more. This Whitman Urban Renewal plan did not itself affect the Whitman project site. Although the site was located within the Urban Renewal Area, it was designated as land to be used solely for public housing; indeed, the project site was the only area in Whitman which was designated for that purpose. 425 F. Supp. at 995. RDA's plan did not involve public housing *per se,* but rather involved assuring a substantial number of comfortable, attractive single-family residences in Whitman through the replacement or renovation of existing row-houses. The district court summarized RDA's efforts in Whitman as follows:

> RDA, with federal funds from HUD and from other sources, condemned and acquired a total of 101 properties and parcels of land in the Whitman Urban Renewal Area at a total estimated cost of $1,550,075. Between 1969 and 1973, 109 new homes were privately developed and sold for between $25,000 and $30,000, all of which were eligible for FHA-insured mortgages. (N. T. 2-16). There was no opposition by WAIC to these privately developed homes. (N. T. 2-20). From January 1, 1966 until May 1, 1975, Whitman residents, through RDA and with the aid of federal funds, have obtained $2,718,278 in loans and grants to rehabilitate their homes. (N. T. 2-20). A total of 1,123 households have received funds from this program. Over one-fourth of all the households in the Whitman area have benefited from the grant and loan program initiated by RDA. (N. T. 2-21).

> Further, urban renewal activities in the area have included a wide range of activities benefiting the Whitman area. (N. T. 2-20).

425 F. Supp. at 996.

All of this RDA sponsored reconstruction in Whitman took place outside of the vacant Whitman project site. As described above by the district court, RDA condemned several blocks adjacent to the project site. Through the efforts of private developers, new townhouses were built on these sites. All of these houses were sold to and are occupied by white families.

It will be recalled the clearance of the Whitman project site during 1959-60 had reduced the total number of black households in southeastern Whitman. Some of these families had relocated in areas adjacent to the cleared project site. RDA's condemnation of several of *these* blocks for construction during 1969-73 had the effect of again dislocating these families. The 1970 census revealed that the combined effect of PHA's and RDA's failure to provide any low-income housing on the vacant Whitman project site, and RDA's condemnation of several blocks adjacent to the project site resulted in an all-white area in southeastern Whitman.[6]

In sum, to repeat the conclusion of the district court, "[t]he effect of these urban clearance actions by both RDA and PHA appears to have converted an integrated area of Philadelphia into a non-integrated area." 425 F. Supp. at 1009.

Although the Whitman project site lay vacant throughout this period (1960-70), planning for the site continued. With the enactment of the Barrett Amendment and the abandonment of a high-rise design, a new plan for the site,

6. Testimony at trial revealed that the population of southeastern Whitman has remained all white. *See* N. T. 31-148 to 149.

involving both PHA and RDA, was developed. PHA sold the Whitman site to RDA for $1,217,679.59. 425 F. Supp. at 996. RDA in turn was to convey the site to a private developer, which would construct low-rise public housing upon it.

The need for a new plan that would be acceptable to WAIC led to the endorsement of the concept of a "turnkey" developer. As described by the district court:

> A turnkey developer differed from a conventional housing developer in that the turnkey developer would purchase the land, hire the architect to design the project, produce the drawing, set a cost for his project and then submit his proposal to the Housing Authority. (N. T. 5-22). The Housing Authority, if it decided to accept a turnkey developer's proposal, would, after appropriate public hearings and approvals, sign a contract with the turnkey developer and HUD, which specified that the turnkey developer would build the project and upon completion turn it over to the Housing Authority for the agreed upon purchase price. The Housing Authority would manage the project and HUD would provide the necessary subsidies. (N. T. 5-22, 5-23).

425 F. Supp. at 996. HUD's involvement necessitated review by the agency's Equal Opportunity staff. As the Whitman project site could now be described as an integrated project planned for an all-white area, HUD approved the site for low-income, turnkey housing on June 4, 1968.[7]

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7. HUD later re-approved the project under Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, which incorporated a "balancing" concept to HUD's site-approval procedures. "Balancing" permitted the approval of a project that would *not* advance racial integration if that project was paired with another that *would*

PHA and RDA solicited turnkey developers for the project during the latter part of 1969. From the 12 developers who responded, PHA chose Multicon Construction Corp. and Multicon Properties, Inc. ("Multicon") to build the Whitman project. PHA's choice of Multicon was approved by HUD on May 20, 1970. RDA and Multicon entered into a contract on July 14, 1970 under which Multicon might obtain the project site and build the project. The Philadelphia City Council and then-Mayor Tate enacted an ordinance approving Multicon; an agreement of sale was executed by PHA and Multicon; and, on October 30, 1970, RDA conveyed title of the site to Multicon.

Multicon's design called for the building of 120 townhouses on the Whitman site. Unlike most public housing to that point in time, each unit was to be a discrete structure on its own plot of land—much closer in conception to the detached, single-family home characteristic of suburban developments than to the typical multi-family structures characteristic of low-income public housing. Indeed, one reason why Multicon's plan was selected was its compatibility with the surrounding neighborhood: the plan "maintained existing street patterns and the housing was of the same design as the other houses in the Whitman area." 425 F. Supp. at 997. This design also met the requirements for a newly promulgated federal program, "Turnkey III", under which the tenants of a project could eventually own their homes by paying rent, assuming main-

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7. (Cont'd.)
produce a measure of integration. Here, the Whitman project, which would foster integration, was to be paired with the "Morton Addition", a project to be located in an all-black area. The approval of the Morton Addition was contingent upon the building of the Whitman project. Despite the failure to construct the Whitman project, the Morton Addition has nevertheless long since been completed and occupied. *See* 425 F. Supp. at 997 & n. 15.

tenance responsibilities and residing in the project for a designated time.[8]

Approval of an urban renewal project necessitated consultation with local community representatives. WAIC was designated the "local citizen participation unit" for the Whitman Urban Renewal Area. The district court described a process of extended consultation with and participation by WAIC during the course of the approval process. 425 F. Supp. at 997. WAIC's suggestions produced modifications in Multicon's plan, and the result, by June 2, 1970, was a meeting at which the Turnkey III proposal was fully explained. The minutes of the June 2d meeting reported a consensus: "It was agreed the proposed plans look excellent." (N. T. 2-26). WAIC's endorsement of the planned townhouses is revealed in a letter dated June 9, 1970, from the then-President of WAIC to Multicon, the developer:

> We were very impressed with the plans and feel that the design of these houses will make them an asset to our community.

(N. T. 2-26).[9]

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8. The district court described the Turnkey III program for the Whitman project as follows:

> "Originally, of course, PHA would own and operate the Whitman Park Townhouse Project. The common areas which PHA would retain control of after the homes were purchased by public housing tenants were kept to a minimum. (N. T. 5-48). Tenants would take on maintenance responsibilities to build up "sweat equity" to enable them to make a down payment and eventually to own their homes.

425 F. Supp. at 997 n. 18. For other descriptions of HUD's Turnkey III program, *see* Catz, Historical and Political Background of Federal Public Housing Programs, 50 N. D. L. Rev. 25, 37-40 (1973).

9. The letter also refers to a change in the design which WAIC had suggested and which the district court opinion reveals was adopted by Multicon and PHA. *See* 425 F. Supp. at 997.

A ground-breaking ceremony for the Whitman Park Townhouse Project was held on December 16, 1970. Between the ground-breaking and the scheduled start of construction in late March 1971, however, WAIC's attitude toward the Townhouse Project shifted and hardened. By January 28, 1971, the President of WAIC was expressing doubts about the project; by March 22, 1971, WAIC had elected a new President and had decided to oppose the project—specifically, "to demonstrate the next morning" when construction was finally to begin. (N. T. 2-33). The stipulated facts revealed the following sequence of events when Multicon sought to commence construction of its townhouses on March 23rd:

> Beginning on or about 7:30 A. M. on March 23, 1971 approximately thirty women, some of whom were WAIC members, entered on the site of the Whitman Park Townhouse Project and gathered around the bulldozer and backhoe, blocking the operations of the contractor, refusing to leave the property when so requested and preventing the operations of these pieces of equipment. Fred Druding, the new WAIC President, was also present in the morning. . . .
>
> On or about 9:05 A. M. on March 23, 1971 demonstrators, including WAIC members, blocked a truck on Shunk Street from the Atlas Lumber and Millwork Company, which was attempting to make a delivery to MPI at the Whitman Park Townhouse Project, and as a result the truck driver was unable to enter the property to make the delivery. P-61 is incorporated herein.
>
> On or about eight o'clock on March 25, 1971 [former WAIC President] Mrs. Alice Moore and other demonstrators, including members of WAIC, gathered around the bulldozer of Louis Dolente and Sons,

> parked on the northeast corner of Hancock and Shunk Streets, thereby preventing its operation.

(N. T. 2-33 to 34) (paragraph numbering omitted).

Unable to begin work, Multicon sought to enjoin further demonstrations in the Philadelphia County Court of Common Pleas. Although Multicon obtained a preliminary injunction, its attempts to return to work were to no avail, as demonstrators continued to block deliveries from Multicon's contractors and to bar all access to the project site. Multicon's request to the Philadelphia police to enforce the state court injunction was rebuffed.[10] Eventually, on April 30, 1971, the Pennsylvania state court judge decided to bar Multicon from attempting to return to work while the parties negotiated a settlement. 425 F. Supp. at 998.

The district court summarized the ensuing negotiations between the parties as follows:

> Shortly thereafter, there were a series of meetings between WAIC, PHA and Multicon. (N. T. 2-78, 3-41, 3-42, 10-39). Various changes in the Whitman Park Townhouse Project were proposed to WAIC in order to settle the controversy, including opening a building in the project as a community recreation area, reserving 50% of the units for persons who were displaced by the clearance for the Whitman project, raising the income levels of those persons who would be eligible for the project and setting up a screening committee, which would include Whitman residents, to assure that those living in the project would be an asset to the community. (N. T. 3-45, 10-43, 10-44, 10-45, 10-46, 10-47). On May 17, 1971, after full discussion and consideration of the settlement pro-

10. As the district court determined, "City Managing Director Corleto stated that Multicon would not receive police assistance." 425 F. Supp. at 998.

posals, WAIC voted down the final settlement offer of PHA. N. T. 2-89, 3-45, 3-46). On May 18, 1971, Mayor Rizzo was nominated as the Democratic candidate for Mayor. (N. T. 3-53). On May 20, 1971, a meeting was held in Judge Hirsch's chambers to consider a request by Multicon that the court's order of April 30, 1971 be lifted and that Multicon be permitted to return to work on the Whitman Park Townhouse Project. (N. T. 3-55, 3-56, 19-21, 19-24, 19-25). At the May 20th meeting, Managing Director Corleto stated that the City would not provide police assistance for Multicon should it return to work. (N. T. 3-57, 19-26 to 19-28). Mr. Gordon Cavanaugh, Chairman of PHA, stated to those present at the meeting that he had been instructed by Mayor Tate to order Multicon not to resume work. (N. T. 2-91, 3-59, 19-26, 19-34, 19-36). Judge Hirsch then signed an order permitting Multicon to return to work. However, faced with a threatened lack of police assistance, Multicon decided that it would not then return to work. (N. T. 19-38). On June 3, 1971, Multicon approached HUD in Washington, D. C. and sought assistance from HUD in building the Whitman Park Townhouse Project. (N. T. 3-69, 10-73). Multicon requested HUD to exert whatever pressure it could upon the City to get the City to cooperate in building Whitman. (N. T. 3-69, 10-73). However, a HUD official in Washington, D. C. stated that HUD did not want to take any action until after the November, 1971 election in Philadelphia. (N. T. 10-74 to 10-76).

425 F. Supp. at 998-99. (Footnote omitted).

At this juncture, on June 25, 1971, plaintiffs filed the complaint in the instant action in the United States District Court for the Eastern District of Pennsylvania. However,

in view of the pending state court proceedings involving the various defendants and the possibility that those proceedings might provide a resolution of the dispute over the Whitman project, the federal court action was stayed. Later, with the realization that such a final resolution would not be forthcoming in the state courts, *see* 425 F. Supp. at 992-93, the parties went through drawn-out, constantly contested discovery proceedings which continued until the eve of trial on October 7, 1975.

During these 4½ years of pretrial maneuvering in the federal district court, Whitman remained a site of controversy rather than a site of construction. On July 18, 1971, the same day that Multicon finally obtained a permanent injunction against WAIC's interference with Multicon's construction efforts at the Whitman site,[11] WAIC filed its own lawsuit, *WAIC v. Multicon*, No. 1187 (July Term 1971, C. P. Phila.), in an attempt to prevent that construction. This action was to continue until March 20, 1974, when it was finally dismissed as moot.

1971 was an election year in Philadelphia. During the mayoral campaign, the present Mayor, Frank Rizzo, "publicly took the position that within the framework of the law, he would support local communities in their opposition to public housing projects proposed for their neighborhoods. (N. T. 42-75, 42-77)." 425 F. Supp. at 1001.[12] While campaigning, Mayor Rizzo strongly supported WAIC's resistance to the Whitman project.[13]

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11. Multicon v. WAIC, No. 4515 (March Term 1971, C. P. Phila.), *cited at* 425 F. Supp. at 999.

12. Mayor Rizzo testified at trial that

> "I had a strong feeling when I ran for election, it was crystal clear, that I would preserve the neighborhoods of the City at any expense."

425 F. Supp. at 1001, *quoting* N. T. 42-82.

13. Mayor Rizzo's campaign activities in support of WAIC and his rationale for taking that position are described in the district court opinion, 425 F. Supp. at 1001.

Once elected, the opposition of Mayor Rizzo and his City Administration to the Whitman project did not abate.[14] Indeed, Mayor Rizzo told James Greenlee, the chairman of PHA, that he meant to honor his campaign promise to Whitman residents that the Townhouse project would not be built. 425 F. Supp. at 1002. The Mayor urged Greenlee to investigate the possibility of cancelling the project. Mayor Rizzo was informed that cancellation of the Townhouse project would jeopardize federal funding for the entire city, especially in light of the project's HUD-necessitated pairing with the already constructed Morton Addition Project in a racially impacted area of Philadelphia. *See* note 7 *supra*. In view of these possible

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14. Testimony before the district court revealed the following: After Mayor Rizzo's election in November of 1971, he had several meetings with James Greenlee, who was at that time both general counsel for RDA and Chairman of PHA. In November of 1971, Mr. Greenlee, as general counsel for RDA, gave a legal opinion to RDA, which was subsequently forwarded to HUD on November 23, 1971, that all required procedures had been followed in the planning and development of the Whitman Park Townhouse Project, and that no further public hearings were necessary. (N. T. 9-99, 14-18).[23] After Mayor Rizzo was elected Mayor in November, 1971, but before he took office in January, 1972, Mr. Greenlee, as Chairman of PHA, met with Mayor Rizzo to discuss the housing program in the City of Philadelphia. (N. T. 14-23 to 14-25). Mr. Greenlee testified that the Mayor's support was necessary to develop any type of housing program in order to assure passage of the necessary ordinances before City Council. (N. T. 14-26). After discussion of the proposed public housing plans, Mayor Rizzo expressed disfavor as to the sites proposed. (N. T. 14-47). Mayor Rizzo stated that he considered public housing to be the same as Black housing in that most tenants of public housing are Black. (N. T. 14-47). Mayor Rizzo therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them. (N. T. 14-47). Furthermore, Mayor Rizzo stated that he did not intend to allow PHA to ruin nice neighborhoods. (N. T. 14-47, 14-48).

. . .

425 F. Supp. at 1001-02 (footnote omitted).

consequences, Greenlee suggested that an attempt at compromise should be made. Mayor Rizzo rejected any compromise where "people in the area felt that Black people would be moving into the area if public housing were built." 425 F. Supp. at 1002.

Faced with Mayor Rizzo's unequivocal disavowal of PHA's obligation to build the Whitman Townhouse project, Greenlee described to Rizzo the procedure for cancellation of public housing projects set out in the so-called "Phillips Amendment," Pub. L. No. 85-176, 67 Stat. 298, 306. In addition to requiring that the City repay any federal monies advanced and settle all claims by the builder, the Phillips Amendment would require a public hearing before the Philadelphia City Council. Mayor Rizzo indicated that the City's termination costs would be no obstacle; however, the public hearing requirement was anathema to him because the procedure "would bring Black people to City Hall to protest the proposed cancellation." 425 F. Supp. at 1002.

The City's subsequent opposition to the Whitman project took many forms. These were detailed in part by the district court when it described some of the difficulties encountered by Multicon. 425 F. Supp. at 999-1001. In addition, Multicon, the project developer, was told by Deputy Mayor Philip Carroll "that the City did not want the Whitman project built." *Id.* at 1002.

Multicon turned to HUD for assistance in clearing the City's impediments to construction, 425 F. Supp. at 1002, asking that HUD consider use of its power to cut off all federal funding to the City to force the construction of the project. HUD rejected this suggestion "for political reasons." *Id.* at 1002-03 n. 28.

Meanwhile, RDA set the stage for a possible termination of the construction contract. The district court opinion

notes that RDA passed a resolution on April 28, 1972, authorizing its general counsel to act in the event PHA certified that Multicon was in default on the contract. *Id.* at 1003. Multicon thus found itself between a rock and a hard place. On the one hand, it was bound by its contract with PHA to complete construction by April 29, 1972, and was therefore potentially liable for breach of contract if it failed to complete the project. On the other hand, the combined opposition of WAIC and the City prevented construction from going forward. Choosing the alternative of once again attempting to resume construction, Multicon gave notice to the City that such construction would begin on June 26, 1972.

Multicon's optimism was not fulfilled. State-court litigation ensued. The district court's opinion traces these state court proceedings and we will not burden this opinion with a recitation of those events. Suffice it to say that this litigation did not result in a resumption of construction of the Whitman project. *See* 425 F. Supp. at 1003-06. As of the present time, the site is vacant, with no construction apparently contemplated. Still, HUD holds an appropriation of $3.68 million for the construction of the Whitman Townhouse project as planned. 425 F. Supp. at 1006.

B. *Procedural History.*

This case, as noted above, first came before the district court in 1971. Because of the parties' hope that ongoing state court litigation would produce a settlement resolving their dispute, and because of the complexity of pretrial discovery once that hope was proved futile, trial in the Eastern District of Pennsylvania did not begin until October 7, 1975. The case was tried without a jury over a span of 57 days.

Plaintiffs brought the suit as a class action, claiming to represent

> all low income minority persons residing in the City of Philadelphia who, by virtue of their race, are unable to secure decent, safe and sanitary housing, outside of minority concentration, and who would be eligible to reside in the Whitman Park Townhouse Project.

425 F. Supp. at 993. The district court certified the suit as a class action on behalf of this class on May 8, 1975. Several individual members of the class were also named as plaintiffs, although only one of these testified at trial.

Two organizational plaintiffs are also parties. The Resident Advisory Board ("RAB") has at least a nominal membership of "all those currently living in public housing in the City of Philadelphia," 425 F. Supp. at 993, and, pursuant to an agreement with PHA, it routinely represents public housing tenants' interests in matters concerning PHA, HUD or the tenants themselves. The other organizational plaintiff, the Housing Task Force of the Urban Coalition, is described as a division of the Urban Coalition "concerned mainly with improving housing conditions for lower income people . . . [and] with the availability of public housing for those low income groups." *Id.* at 994.

Originally, the defendants were the Mayor of Philadelphia in 1971, James H. J. Tate, the City Managing Director Fred Corleto, and the two Multicon corporations. WAIC was permitted to intervene as a defendant, and PHA, RDA and HUD were added, first as third party defendants (by WAIC) and eventually as defendants (by plaintiffs). The change in City administrations in 1972 resulted in joinder of Mayor Rizzo and the City's new Managing Director, Hillel Levinson, as individual defend-

ants. The new Mayor and Managing Director were substituted in their official capacities as well. Finally, the Philadelphia City Council was added to the roll of defendants to protect against the contingency of the district court's ordering relief that could only be afforded by City Council action.

The 57-day trial produced a voluminous record, which included several hundred exhibits and testimony from experts for both sides as well as from various public officials. At the conclusion of the trial, the district court determined that plaintiffs were entitled to equitable relief and on November 5, 1976, entered the following order:

> [I]t is hereby ORDERED as follows:
>
> (1) The defendants Philadelphia Housing Authority, Redevelopment Authority for the City of Philadelphia, City of Philadelphia, Department of Housing and Urban Development, their officers, agents, and employees shall immediately take all necessary steps for the construction of the Whitman Park Townhouse Project as planned.
>
> (2) PHA shall submit to this Court within ninety days a plan for the racial composition of the Whitman Park Townhouse Project.
>
> (3) PHA shall present to this Court within ninety days a plan concerning the tenanting of all public housing projects within the City of Philadelphia which will further racial integration.
>
> (4) All parties to this litigation are enjoined from taking any action which will interfere in any manner with the construction of the Whitman Park Townhouse Project.

425 F. Supp. at 1029.

Defendants PHA, RDA, WAIC and the City have appealed.

While the district court has yet to render final judgment within the meaning of 28 U. S. C. § 1291,[15] nevertheless this Court has jurisdiction to review the four-part injunctive Order of November 5, 1976, *see* 28 U. S. C. § 1292(a)(1), despite the fact that in part the district court order contemplates no more than the submission of plans by PHA. *Frederick L. v. Thomas*, — F. 2d —, No. 76-2385, slip op. at 10-15 (3d Cir. June 17, 1977).

II.

At the outset we observe that the Supreme Court's recent decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, — U. S. —, 45 U. S. L. W. 4073 (January 11, 1977) resolves any doubt that the district court correctly reached the merits of this dispute. Based upon the *Arlington Heights* discussion of standing—and its discussion of *Warth v. Seldin*, 422 U. S. 490 (1975)—it is clear that both the institutional and individual plaintiffs here have " 'alleged such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." [16]

Specifically, the *Arlington Heights* Court looked to the injury suffered by a potential tenant of the specific project

15. The district court's opinion reveals, for example, that the issue of attorneys' fees remains open. 425 F. Supp. at 1028-29. In addition, the court's order anticipates the submission and review of integration plans for both the Whitman Townhouse project, Order of November 5, 1976, ¶ (2), and all public housing in Philadelphia, *id.*, ¶ (3). Thus the Order of November 5, 1976, lacks the requisite finality for appellate review under 28 U. S. C. § 1291.

16. Arlington Heights, *supra*, 45 U. S. L. W. at 4076, *quoting* Warth v. Seldin, *supra*, 422 U. S. at 498-99, *and* Baker v. Carr, 369 U. S. 186, 204 (1962).

which had not yet been approved for construction because of Arlington Heights' refusal to rezone. That "tenant's" complaint, far from being a mere "generalized grievance," "focus[ed] on a particular project and [was] not dependent on speculation about the possible actions of third parties not before the court." 45 U. S. L. W. at 4077. Thus the Supreme Court concluded that the *Arlington Heights* plaintiffs had standing to assert their claims, and the Court proceeded to reach the merits of the controversy.

Here, the named individual plaintiffs assert the same type of allegation that sufficed to afford standing in *Arlington Heights.* Their grievance, like that of the potential "tenant" in *Arlington Heights,* focuses on the failure by responsible public officials to take the steps necessary to construct a specific project (the Whitman Townhouse project). As in *Arlington Heights,* granting the relief that the plaintiffs here seek will produce "at least a 'substantial probability' that the [Whitman] project will materialize, affording [plaintiffs] the housing opportunities [they] desire." *Id.* (citation omitted).

As the district court's discussion reveals, 425 F. Supp. at 1011-12, two separate individuals—Jean Thomas (a present public housing tenant) and Nellie Reynolds (the head of RAB and a present public housing tenant)—testified that each would suffer a particularized injury if the Whitman project is not constructed. In addition a substantial portion of the membership of RAB would also be eligible to live in the Whitman project if completed. Thus RAB, with a number of members who could individually aver an "actionable causal relationship" between the failure to construct the Whitman project and his or her own injury, has standing to raise the claims asserted by plaintiffs. *Compare United States v. SCRAP,* 412 U. S. 669 (1973) (standing found where injury to individual members was shown) *with Sierra Club v. Morton,* 405 U. S.

727 (1972) (no standing in absence of showing of particularized injury to members).

We therefore proceed to the merits.[17]

III.

A. *HUD.*

Section 3608(d)(5) of Title 42, United States Code, directs the Secretary of Housing and Urban Development to:

> administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

42 U. S. C. § 3608(d)(5). HUD, obviously recognizing its affirmative duty (to exercise its best efforts to have the

17. Having concluded that both RAB and two individuals who testified at trial (Ms. Thomas and Ms. Reynolds) have standing to raise the constitutional claims alleged here, we need not consider the effect of Ms. Thomas's attempted withdrawal of her testimony. *See* 425 F. Supp. at 1011. Suffice it to say that there were parties with standing at all times before the district court; that the court did not abuse its discretion in certifying the plaintiff class; and that the interests of the certified class were well-served by the vigorous advocacy of plaintiffs' counsel. We conclude that no prejudice inured to any party as a result of Ms. Thomas's testimony and application to withdraw that testimony. The "case or controversy" requirement of Article III has been met.

While the discussion has focused upon the plaintiffs' standing to raise their constitutional claims, our resolution of the standing question in this context also resolves any question of "Title VIII" standing (under 42 U. S. C. §§ 3601 et seq.). Here, as in *Arlington Heights*, the gravamen of the specific Title VIII grievance—failure to construct a housing project—is the same as that underlying the constitutional claim. Given that plaintiffs have standing to raise the constitutional claim, they cannot be said to lack standing to assert the same claim under Title VIII. For, as the Supreme Court noted in Trafficante v. Metropolitan Life Ins. Co., 409 U. S. 205, 209 (1972), Title VIII standing is as broad as Article III permits. *Cf.* Village of Arlington Heights v. Metropolitan Housing Development Corp., *supra*. (Court found "constitutional" standing; remanded for consideration of Title VIII claims).

project constructed), has not appealed from the district court's Order of November 5, 1976.[18]

B. *The City.*

The district court based its issuance of injunctive relief against the City of Philadelphia on three separate grounds. First, the City was found liable for failing to undertake affirmative action "implementing the national policy of fair housing." [19] *i.e.*, failing to discharge duties imposed by 42 U. S. C. § 3608(d)(5). *See* 425 F. Supp. at 1018-19. Second, the court found the City liable under an unspecified section of Title VIII because the City's actions with respect to the Townhouse project had "a disparate racial effect" [20] and thus established a Title VIII *prima facie* case not overcome by any "compelling governmental interest." *See id.* at 1021-24. Finally, the court found that the City had violated the Civil Rights Act of 1866 (42 U. S. C. §§ 1981 & 1982) and the Thirteenth and Fourteenth Amendments because the actions of the City had a racially discriminatory impact and were taken with a discriminatory purpose or motivation. 425 F. Supp. at 1024, 1025. We conclude, as did the district court, that

18. We previously discussed the nature and scope of the affirmative duty placed upon HUD by § 3608(d)(5) in Shannon v. HUD, 436 F. 2d 809, 816 (3d Cir. 1970). As discussed below, our disposition of the instant appeal does not require us to address the question or to determine whether the judicially enforceable "affirmative" duty imposed upon HUD by § 3608(d)(5) can be imposed inferentially upon local housing authorities as well. *Compare* Acevedo v. Nassau County, 500 F. 2d 1078, 1082 (2d Cir. 1974) (§3608(d)(5)'s affirmative duty to promote integration imposed upon HUD alone) *with* Otero v. New York City Housing Auth., 484 F. 2d 1122, 1133-34 (2d Cir. 1973) (§ 3608(d)(5) imposed duty "to act affirmatively to achieve integration in housing" on Secretary of HUD and "through him on other agencies administering federally-assisted housing programs").

19. 425 F. Supp. at 1018.

20. *Id.* at 1023.

the City violated § 1981 and § 1982 by depriving plaintiffs of constitutional rights guaranteed by the Thirteenth and Fourteenth Amendments.[21]

Current Supreme Court decisions mandate that to establish that a governmental defendant has abridged constitutional guaranties, something more than a disproportionate discriminatory impact must be proved. This "impact-plus" test is satisfied only if, in addition to disproportionate impact, a discriminatory purpose is shown. *Washington v. Davis*, 426 U. S. 229, 239-45 (1976); *see also Dayton Board of Education v. Brinkman*, — U. S. —, 45 U. S. L. W. 4910, 4914 (June 27, 1977) (test is "whether there was any action [by government defendants] which was intended to, and did in fact, discriminate"); *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra*, 45 U. S. L. W. at 4077 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

Where civil rights plaintiffs claim that discrimination in housing has worked a deprivation of equal protection, the starting point for analysis is the Supreme Court's recent decision in *Arlington Heights, supra*. In that case, the Village of Arlington Heights was requested to rezone a tract of land to permit construction of racially integrated low and moderate income housing. At public hearings, the Village's Plan Commission heard opponents denounce the proposed change for a variety of reasons—the undesirability of introducing racially integrated housing to Arlington Heights (which at that time had a population that was

21. In light of our disposition, we do not address the question of the applicability of affirmative duties imposed by 42 U. S. C. § 3608(d)(5) upon a municipality, (here, the City of Philadelphia), *see* note 18 *supra*, nor do we find it necessary to determine precisely which provision of Title VIII the City violated. *But see* section B, *infra*.

99.9% white); the unfairness of the change to adjacent landowners who had purchased their property in reliance upon single-family zoning, and the incompatibility of permitting multi-family construction in the middle of a single-family residential neighborhood when all other multi-family tracts (and there were such tracts) had theretofore been zoned and located to act as "buffers" between single family neighborhoods and industrial or commercial districts. *See* 45 U. S. L. W. at 4075. The Plan Commission, and the Village, denied the requested zoning change. A subsequent civil rights action by the developers who had proposed the project (and by individuals who would be eligible to live in the project) resulted in judgment for the Village in the district court. The Court of Appeals for the Seventh Circuit reversed, 517 F. 2d 409 (7th Cir. 1975), although the court left undisturbed the district court's finding that *Arlington Heights'* denial of the requested change was not racially motivated. The Court of Appeals' holding rested upon the assumption that a showing of a racially disproportionate *impact* would suffice to invalidate governmental action, absent demonstration of a compelling interest.

The Supreme Court's opinion in *Washington v. Davis, supra,* negated this assumption. On certiorari in *Arlington Heights,* the Supreme Court reversed the Seventh Circuit's decision, citing the absence of proof of racially discriminatory *intent.* 45 U. S. L. W. at 4078. The Court, in discussing the application of the *Washington v. Davis* standard in a "housing" case, said:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a

single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis*, 426 U. S., at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Guinn v. United States*, 238 U. S. 347 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939); *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane v. Wilson, supra; Griffin v. County School Board*, 377 U. S. 218 (1964); *Davis v. Schnell*, 81 F. Supp. 872

> (SD Ala.), aff'd *per curiam*, 336 U. S. 933 (1949); cf. *Keyes v. School District No. 1*, 413 U. S., at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey*, 387 U. S. 369, 373-376 (1967); *Grosjean v. American Press*, 297 U. S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

45 U. S. L. W. at 4077 (footnotes omitted). When this instruction in mind, the *Arlington Heights* Court upheld the district court's finding that discriminatory purpose was *not* a motivating factor in the Village's decision.

We note that in the instant case the district court judge gave full effect to the teachings of *Washington v. Davis*, even though the decision below was rendered before *Arlington Heights* was decided. *See* 425 F. Supp. at 1024-25. For example, before considering the City's alleged breach of plaintiffs' right to equal protection, the district court's opinion analyzed the source and nature of the opposition of WAIC to the Whitman Townhouse project. The court concluded that although the record revealed evidence of racial bias by individual WAIC members, that evidence was insufficient to warrant a finding of racially discriminatory intent. *Id.* at 1024. Thus no constitutional (Thirteenth Amendment) violation by WAIC was found.

Turning to the City, however, a different picture emerges. The district court held that the City had acted with racially discriminatory intent, as evidenced by: (1) the City's joining in opposition to the Whitman Townhouse project with knowledge that some of that opposition was racially motivated; (2) Mayor Rizzo's explicit statements equating "public housing" with "Black housing" and his public stand "against placing such housing in White neighborhoods"; and (3) the City's taking steps to terminate the project with knowledge that the action would produce a racially discriminatory effect. 425 F. Supp. at 1025.

As for the actual consequences of the failure to construct the Whitman Townhouse project, the district court found the following effects of termination:

> The cancellation of the Whitman Park Townhouse Project had a racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia. The waiting list for low-income public housing in Philadelphia is composed primarily of racial minorities. Of the 14,000 to 15,000 people on the waiting list for public housing in Philadelphia (N. T. 56-84), 85% are Black, and 95% are considered to be of racial minority background. (N. T. 40-103). Obviously those in housing projects, which are overwhelmingly Black, and those on the public housing waiting list, are those least able to move out of the poorer, racially impacted areas of Philadelphia. The evidence also established that Blacks in Philadelphia who are concentrated in the three major Black areas of Philadelphia, have the lowest median income in comparison with the total population of Philadelphia and live in the poorest housing in Philadelphia. The Whitman Park Townhouse Project was a unique opportunity for

> these Blacks living in racially impacted areas of Philadelphia to live in an integrated, non-racially impacted neighborhood in furtherance of the national policy enunciated in Title VIII of the Civil Rights Act of 1968. Public housing offers the only opportunity for these people, the lowest income Black households, to live outside of Black residential areas of Philadelphia. Cancellation of the project erased that opportunity and contributed to the maintenance of segregated housing in Philadelphia.

425 F. Supp. at 1018. This discriminatory effect and the invidious discriminatory purpose underlying the City's role in the project's termination together were found to establish a constitutional violation under *Washington v. Davis.*

Applying the Supreme Court's *Arlington Heights* elaboration of the "impact-plus" test of *Washington v. Davis,* the district court's conclusions are, if anything, reinforced. Under the applicable *Arlington Heights* criteria, "invidious discriminatory purpose" can be gleaned through an inquiry which weighs a number of factors:

(1) discriminatory impact;

(2) the historical background of the attacked decision;

(3) the "sequence of events leading up to the challenged decisions";

(4) departures from "normal procedural sequences"; and

(5) departures from normal substantive criteria.

Arlington Heights, supra, 45 U. S. L. W. at 4077. *See* pages 29-30 *supra.*[22]

22. Arlington Heights also suggests reference to a sixth evidentiary source, legislative or administrative history, but that factor is not applicable here.

Here, the discriminatory impact of the City's obstruction of the project could hardly be clearer. As the district court's findings reveal, the Whitman Townhouse project, when built and tenanted, would restore a measure of racial integration to a now-all-white portion of Whitman, thus providing an opportunity for at least some of those currently on the PHA's public housing waiting list—95% of whom are nonwhite—to live in an integrated, non-racially impacted environment. The City's opposition to the construction of the project had the undeniable effect of "bear-[ing] more heavily on one race than another," *Arlington Heights, supra,* 45 U. S. L. W. at 4077, *quoting Washington v. Davis, supra,* 426 U. S. at 242.

But discriminatory effect, standing alone, will only infrequently suffice to establish an equal protection violation.[23] When further inquiry into purpose is necessary—

23. The Court in Washington v. Davis did observe that

> It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

426 U. S. at 242. Mr. Justice Stevens, concurring in Washington v. Davis, suggested that under certain circumstances (*e.g.*, where the "disproportionate impact" is "dramatic"), the inquiry into discriminatory *purpose* may well be subsumed by the inquiry into, and the finding, of discriminatory effect. *See, e.g.*, Castaneda v. Partida, — U. S. —, 45 U. S. L. W. 4302 (March 23, 1977) (disparate impact in Texas's "keyman" system of selecting grand jurors held sufficient proof of discriminatory intent). *See also* Dayton Board of Education v. Brinkman, — U. S. —, 45 U. S. L. W. 4910, 4915 (June 27, 1977) (Stevens, J., concurring).

Nonetheless, for most cases the Court's admonition in Washington v. Davis must be heeded:

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

426 U. S. at 242. Once such a "disproportionate impact" is shown, the normal course will be to search out other facts which, in conjunction with that impact, will demonstrate an "invidious discriminatory purpose" as well.

as is the case here—the remaining factors noted by the *Arlington Heights* Court come into play.

The second "evidentiary source" to be considered, 45 U. S. L. W. at 4077, is the historical background of the allegedly discriminatory decision. Here, the historical backdrop to the City's obstruction of the Whitman project, *i.e.*, the events occurring prior to the current City Administration's assumption of power in 1972, is easily summarized. The City's housing authority, PHA, administered a public housing system that was *de jure* segregated through the 1940's. Nonetheless, it was PHA that proposed the original high-rise project in Whitman and cleared the site for construction. The City's role appeared to be a purely passive one at that point. When the current low-rise design was adopted, the City Council and then-Mayor Tate enacted an ordinance approving Multicon as the developer. These acts were taken before WAIC reversed its earlier endorsement of the project and began its campaign of active opposition.

It was at that point that the City's passive role ended. The City's frustration of Multicon's effort to enclose the construction site (*see* 425 F. Supp. at 999-1001)—a security measure which, if effected, undoubtedly would have permitted construction to proceed—gives evidence of the City's joining in community opposition. The repeated refusals by the Philadelphia police to protect Multicon's construction activities buttress this conclusion, as does then-Mayor Tate's decision to order Multicon to halt construction. While this background provides no direct evidence of discriminatory purpose on the City's part, the circumstances of a sudden shift in the City's position from passive acceptance to active opposition, in the face of protests by demonstrators manifesting racial bias,[24] provides some indication of an improper motive or purpose.

24. *See* 425 F. Supp. at 1024.

The third factor specified in *Arlington Heights, see* p. 32 *supra,* is the specific sequence of events leading to the challenged decision: here, the record of the Rizzo administration's position to the Whitman project. During his election campaign, Mayor Rizzo repeatedly voiced objections to the Whitman project, indicating that he would preserve the City's neighborhoods at any expense, and that he would support any community seeking to prevent construction of a housing project. *See* pp. 19-21 *supra.* In the course of exploring the possible means of preventing the project's construction, Mayor Rizzo equated public housing with "Black housing" (because most public housing tenants are black), and stated that public housing should not be placed in white neighborhoods. 425 F. Supp. at 1001. Similarly, when Mayor Rizzo was told of the Phillips Amendment's fairly rigorous requirements for cancelling a public housing project, he indicated that while the expense of cancellation would not be a barrier, the requirement that a public hearing be held made the procedure unpalatable because such a hearing would bring blacks to City Hall. 425 F. Supp. at 1002.

The district court's opinion also records numerous instances of departures from normal procedural sequences (the fourth *Arlington Heights* factor). The dispute over Multicon's proposed fence provides but one example. City officials gave contradictory instructions, waiving permit and licensing requirements at one moment and insisting on strict compliance the next. Multicon was required to satisfy regulations involving street access and sidewalk maintenance not enforced elsewhere. The most striking example of procedural irregularity, however, is the City's involvement in the attempted termination of the project. It was made clear to City officials that the Phillips Amendment set forth the normal procedure for terminating a

project. However, because that procedure necessitates a public airing of the City's reasons for cancellation, the Phillips Amendment was bypassed. Instead, the City insisted that Multicon, the developer, was in default, and that default by Multicon required termination of the project. The procedure adopted would seem to be especially significant where the "normal" procedure not employed would have required the City to reveal its reasons for making its decision at public hearings.

A glaring "substantive" departure from normal decision-making (the fifth *Arlington Heights* factor) was the City's decision to abandon a housing project which, pursuant to agreement with HUD, had been "matched" with another, already-built project. Normally, we would suspect that breaching an agreement with HUD, with the attendant risk of termination of all HUD aid, would be an unacceptable price for a City administration to pay for the cancellation of a housing project. Such was not the case here: apparently, the price, if not right, was affordable, and no regard was given to the fact that the "matched" project (the Morton Addition, *see* note 7 *supra*) had already been built.

Where, as here, the applicable *Arlington Heights* "evidentiary sources" for a gleaning of official intent all point to unusual, aberrant circumstances surrounding the City's action, which reveal direct and circumstantial proof of racial bias, we will not disturb the district court's finding that the City of Philadelphia was racially motivated in its opposition to the Whitman project.

Indeed, the *Arlington Heights* Court all but anticipated this very case when it observed that a change in zoning laws preventing construction in the face of the announcement of a plan to erect integrated housing would present "a far different case" than *Arlington Heights*. The record here reveals this to be, by analogy, that "far

different" case. The City of Philadelphia changed its stance from passive support for the Whitman project to active opposition only after the initiation of bias-tinged local demonstrations. In terminating the Whitman project, the City violated the plaintiffs' right to equal protection. *See also Cooper v. Aaron*, 358 U. S. 1, 8 (1958) (school board previously going forward with preparation of desegregation plans held to have denied equal protection when in face of community and state governmental protests, it abandoned plans).

To remedy Philadelphia's violation of plaintiffs' constitutional rights, the district court ordered that the City take "all necessary steps for the construction of" and enjoined the City from interfering with, the Whitman project. 425 F. Supp. at 1029. We recognize that once a violation is found, "[t]he task is to correct, by balancing of the individual and collective interests, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971). Notwithstanding the Supreme Court's observation in *Swann* that "the scope of a district court's equitable powers to remedy past wrongs is broad", *id.* at 15, the Supreme Court has in recent equal protection cases given careful scrutiny to the choice of remedy to assure that the relief granted is no broader than that necessary to remove the violation and its effects. *E.g., Dayton Board of Education v. Brinkman*, — U. S. —, 45 U. S. L. W. 4910, 4913-14 (June 27, 1977). *See also Rizzo v. Goode*, 423 U. S. 362, 377 (1976). "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation,'" *Brinkman, supra*, 45 U. S. L. W. at 4913.[25] In short, the federal

25. *Quoting* Hills v. Gautreaux, 425 U. S. 284, 293-94 (1976), *quoting* Swann v. Charlotte-Mecklenburg Board of Education, *supra*, 402 U. S. at 16. *See also* Milliken v. Bradley, 418 U. S. 717, 744 (1974).

equitable remedy must cure the constitutional defect but the dosage must not exceed that necessary to effect the cure.

Here, the injunctive relief decreed by the district court is directly responsive to and seeks to "cure" the violation proved, which arose with the City's resistance to, and obstruction of, the Whitman Townhouse project.

As earlier indicated, *see* note 21 *supra*, having concluded that the district court did not err in its holding that the City had violated the plaintiffs' constitutional rights, we have no need to address the statutory arguments asserted by the plaintiffs and discussed by the district court.

C. *PHA and RDA.*

Having determined that the district court's grant of injunctive relief against the City must be affirmed, we next consider the district court's order as it pertains to the municipal agencies PHA and RDA. As opposed to the finding of intent and discrimination which the district court made with respect to the City, neither of these agencies was found by the district court to have violated the constitutional rights of the plaintiff class. Both, however, were held liable under Title VIII of the Civil Rights Act of 1968, 42 U. S. C. §§ 3601 et seq. Because we conclude that the district court's findings demonstrate that both PHA and RDA committed breaches of 42 U. S. C. § 3604(a) by "making unavailable" or denying (Whitman) housing to members of the plaintiff class, we affirm as to these defendants §§ (1), (2) and (4) of the district court's order which grant injunctive relief to the plaintiffs.

1.

The district court based its holding of Title VIII liability against PHA and RDA upon a finding that the

actions of the two agencies in Whitman resulted in a discriminatory effect, 425 F. Supp. at 1021-24, and upon the conclusion that, in producing that effect, the agencies necessarily breached the "affirmative" duty to further integration, a duty imposed by Title VIII's § 3608(d)(5), 425 F. Supp. at 1013-21. Because we conclude that the showing of discriminatory effect established by the record violated 42 U. S. C. § 3604(a), we decline the invitation to review the finding of a breach of affirmative duty, and we leave for another day the question whether section 3608(d)(5)'s requirement that the Secretary of HUD act "affirmatively" to foster integration [26] applies to local governmental entities as well [27]—and, if so, whether that duty is judicially enforceable.[28] What we do decide is that plaintiffs have established a *prima facie* Title VIII case under § 3604(a) against PHA and RDA by proving that the agencies' acts had a discriminatory effect and that the agencies have failed to justify the discriminatory results of their actions.

Until relatively recently, federal courts were not often called upon to adjudicate Title VIII claims. We attribute this circumstance to our impression that, at least with re-

26. *See* p. A114 *supra*.

27. *See* notes 18 and 21 *supra*.

28. We likewise need not consider alternative bases for affirming the district court's award of injunctive relief against PHA and RDA, *e.g.*, a "taint" theory under which the City's unconstitutional conduct, together with the proven relationship and interaction between the agencies and the City, would so color the actions of PHA and RDA that relief against all three entities might be warranted; or that the governmental defendants violated duties imposed by Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, which proscribes discriminatory exclusion from federally funded programs. *See generally* Lau v. Nichols, 414 U. S. 563, 566-69 (1976) (failure to provide English-language instruction to substantial number of Chinese-speaking students in San Francisco school system held actionable under Title VI).

spect to alleged discrimination in housing by governmental agencies, the inquiry into claimed equal protection violations has made unnecessary a separate consideration of the "coextensive" rights and remedies afforded by Title VIII. However, given the increased burden of proof which *Washington v. Davis* and *Arlington Heights* now place upon equal protection claimants, we suspect that Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent. We conclude that, in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response.

Here, the relevant provision of Title VIII is 42 U. S. C. § 3604(a), which provides that "it shall be unlawful . . . [t]o . . . make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." Section 3604 is among those sections of Title VIII that are enforceable by private parties, *see* 42 U. S. C. § 3612. Indeed, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U. S. 205 (1972), the Supreme Court noted that "complaints by private persons are the primary method of obtaining compliance with [Title VIII]." *Id.* at 209. This statement, while endorsing the viability of Title VIII claims by private plaintiffs, does not indicate the elements of such a claim.

Looking to § 3604(a) itself, we note that the "because of race" language might seem to suggest that a plaintiff must show some measure of discriminatory intent. To so construe § 3604(a), however, would have the effect of increasing the plaintiffs' burden in proving a *prima facie* Title VIII case to a level almost commensurate with the burden of proof required to demonstrate an equal protec-

tion violation. We would be most reluctant to sustain such a requirement.

First, we find significant the fact that in *Arlington Heights,* the Supreme Court, after applying the *Washington v. Davis* "impact-plus" equal protection test to plaintiffs' claim, remanded the case to the Seventh Circuit for consideration of plaintiffs' Title VIII claims. In *Arlington Heights* the lower courts had concluded that only discriminatory *effect* had been proved. If the same "impact-plus" test governed Title VIII actions, consideration on remand of the § 3604(a) claim would have been unnecessary and a waste of valuable judicial resources, factors which could not have been lost upon the Supreme Court. In remanding, rather than directing the dismissal of the *Arlington Heights* litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims.

On remand in *Arlington Heights,* the Seventh Circuit has adopted this interpretation of the Supreme Court's action. *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* — F. 2d —, No. 74-1326 (7th Cir. July 7, 1977) *(Arlington Heights II).* The Seventh Circuit has persuasively put to rest the assumption that the "because of race" language in § 3604(a) requires proof of *Washington v. Davis* intent in Title VIII cases. As *Arlington Heights II* points out, the "because of race" language is not unique to § 3604(a): that same language appears in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(h), yet a *prima facie* case of Title VII liability is made out when a showing of discriminatory *effect* (as distinct from intent) is establised. That the discriminatory effect standard still applies for Title VII cases is demonstrated by Mr. Justice Rehnquist's promulgation of the "impact-plus" equal protection standard in

Washington v. Davis. Justice Rehnquist identified the error in the lower court's analysis of the constitutional claim in *Washington v. Davis* by noting that the test applied would be proper for a Title VII case but was insufficient to make out a constitutional violation. *See* 426 U. S. at 246-48. As mentioned above, the Supreme Court's treatment of Title VIII in *Arlington Heights* is consistent with that Court's adoption of the separate and distinct standards to be employed in adjudicating Title VII claims as contrasted with constitutional claims.

Although the legislative history of Title VIII is somewhat sketchy,[29] the stated congressional purpose demands a generous construction of Title VIII. The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination. *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971) (Title VII); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 211 (1972) (Title VIII). During the long floor debate prior to passage of Title VIII in the Senate, several Congressmen spoke of the importance of Title VIII in eliminating the adverse discriminatory effects of past and present prejudice in housing.[30] Significantly, as the district court noted, while the floor debate continued, Senator Baker introduced an amendment that would have required proof of discriminatory intent to succeed in establishing a Title VIII claim. Adoption of this amendment would by definition have burdened Title VIII with a standard similar to the present "impact-plus" equal protection standard of *Washington v. Davis.* Senator Baker's amendment was rejected, 114

29. Title VIII was adopted by Congress from Senator Mondale's floor amendment to the 1968 Civil Rights Act. Thus committee reports and other documents usually accompanying congressional enactments are missing here.

30. *E.g.*, 114 Cong. Rec. 228 (1968) (remarks of Senator Brooke); *id.* at 3421 (remarks of Senator Mondale).

Cong. Record 5221-22 (1968), with Senator Percy maintaining that if "racial preference" was to be an element of the new legislation, "proof would be impossible to produce." *Id.* at 5216, *quoted at* 425 F. Supp. at 1022.

In light of these considerations, we are convinced that a Title VIII claim must rest, in the first instance, upon a showing that the challenged action by defendant had a racially discriminatory effect.[31]

Having determined that discriminatory effect alone will, if proved, establish a Title VIII *prima facie* case, we must determine under what circumstances a Title VIII defendant can justify the discriminatory effect which results from its challenged action.[32] We agree that the test for

31. In deciding that proof of discriminatory effect will establish a *prima facie* Title VIII case, we join the ranks of several other circuits. *See Arlington Heights II, supra* (Seventh Circuit); Smith v. Anchor Bldg. Corp., 536 F. 2d 231, 233 (8th Cir. 1977) ("Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme"); United States v. City of Black Jack, 508 F. 2d 1179, 1185 (8th Cir. 1974), *cert. denied,* 422 U. S. 1042 (1975). *See also* Kennedy Park Homes Assoc., Inc. v. City of Lackawanna, 436 F. 2d 108, 114 (2d Cir. 1970), *cert. denied,* 401 U. S. 1010 (1971) (per Mr. Justice Clark) (applying discriminatory effect test to both constitutional and Title VIII claims); Note, *Applying the Title VII Prima Facie Case to Title VIII Litigation,* 11 Harv. C. R.-C. L. L. Rev. 138-40, 150-63 (1976).

32. We read the Seventh Circuit's opinion in *Arlington Heights II* as requiring no more than we do in order for a plaintiff to establish a *prima facie* case, *i.e.,* a plaintiff may establish a *prima facie* case by showing discriminatory *effect* without a showing of discriminatory intent. *Arlington Heights II,* Slip Op. at 10. To the extent that the Seventh Circuit would seem to go beyond this standard in its statement of "critical factors," *id.* at 11, our impression is that the court is setting forth a standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant.

Parenthetically, we note that the application of the *Arlington Heights* "critical factors" to the facts of the case before us would result in our sustaining the relief ultimately granted by the district court.

Title VIII liability, like that of Title VII, "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." *Washington v. Davis, supra,* 426 U. S. at 247. The district court, adopting the approach taken by the Eighth Circuit in *United States v. Village of Black Jack,*[33] held that once the plaintiffs' *prima facie* Title VIII case had been made out, presumably under § 3608(d)(5), the burden shifted to the defendant to justify its actions by proving a "compelling" interest. We believe that in placing this burden upon Title VIII defendants, the district court erred, and this without regard to the particular provision of Title VIII which was violated. "Compelling interest" analysis is not a part of Title VII doctrine, and we conclude that this heavy burden should be reserved not for Title VIII defendants, but for those who seek to justify denials of equal protection by *purposeful* discrimination. *See Washington v. Davis, supra; Arlington Heights, supra.*

Looking to Title VII for the correct standard for rebuttal of a *prima facie* case, we note that the "business necessity" test employed in Title VII job discrimination cases, *Griggs v. Duke Power Co.,* 401 U. S. 424, 431 (1971), is of somewhat uncertain application in Title VIII cases. An employment practice producing a discriminatory effect under Title VII might well be justified by the fact that it is "substantially related to job performance."[34] However, is appears to us that the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of

33. 508 F. 2d 1179 (8th Cir. 1974), *cert. denied,* 422 U. S. 1042 (1975).

34. *E.g.,* Castro v. Beecher, 459 F. 2d 725, 732 (1st Cir. 1972).

discriminatory housing practices under Title VIII. As one commentator has observed, "the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot." [35]

For the present, Title VIII criteria must emerge, then, on a case-by-case basis. The discretion of the district court in determining whether the defendant has carried its burden of establishing justification for acts resulting in discriminatory effects may be guided at the least by the following rough measures: [36] a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.[37]

If the Title VIII *prima facie* case is not rebutted, a violation is proved. The question of remedy then remains. We note that the federal courts must stand prepared to provide "such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak*, 377 U. S. 426, 433 (1964). However, we are also mindful of the recent Supreme Court admonitions in equal protection cases that federal equitable relief must be carefully tailored to be no more intrusive than is necessary to remedy proved constitutional violations. *See* part III B at pp. 36-37, *supra*. That admonition is no less forceful where statutory rather than constitutional rights must be vindicated. Thus,

35. Comment, *Prima Facie Case*, note 31 *supra*, at 174.

36. For other factors which may be relevant to the particular case, *see Arlington Heights II*, *supra*, Slip Op. at 11; *see also* note 32 *supra*.

37. If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available.

just as we must be careful to structure and limit equitable relief in cases involving violation of constitutional rights, so too must we be similarly cautious in the light of this record in tailoring the remedy here to that which is necessary to correct the statutory violation found.

2.

As our recitation of the facts found by the district court reveals, the actions of PHA and RDA in connection with urban renewal activities in Whitman have had a racially discriminatory impact. *See* pp. 8-21 *supra;* 425 F. Supp. at 1203 ("it is clear from this record that the actions of . . . RDA and PHA in terminating the Whitman Park Townhouse Project, taken against the background of racial segregation in Philadelphia and in the PHA system, had a disparate racial effect"). This conclusion is not surprising in light of the shift in racial composition in the project area which we described in some detail in the initial part of this opinion. Whereas originally almost 45% of the families living in the Whitman project area were black, by the time urban renewal clearance was completed and the surrounding blocks reconstructed, virtually no black families were to be found in the area. The evidence produced by the plaintiffs, which revealed that the urban renewal activities of the defendants had the result of removing black families from the Whitman site, leaving Whitman as an all-white community, was sufficient to establish a *prima facie* case of discriminatory effect. Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there.

The mere showing of a racially discriminatory effect does not, however, necessarily constitute a violation of

§ 3604(a). *See Arlington Heights II* at 10. However, here no justification has been forthcoming from PHA or RDA[38] to meet, let alone overcome, the plaintiffs' *prima facie* case. As the district court noted, the only justification advanced by any party for the action taken by the defendants was that of the City, but, as we have observed, the threat of violence cannot justify a deprivation of civil rights. Given the absence of *any* justification for PHA's and RDA's actions, we obviously do not find it necessary to assess the legitimacy of their interests as against the discriminatory effect which their actions caused. Similarly, defendants' failure to offer proof of justification renders fruitless consideration of any other factors under any standard which would implicate the discretion of the court in determining whether plaintiffs' *prima facie* case had been overcome.

In sum, therefore, it is apparent that by their actions PHA and RDA were responsible for making unavailable or denying housing, within the mean of § 3604(a), to black families who otherwise would be living in Whitman. This discriminatory effect has not been justified under any standard, and the record bears out the need for, and propriety of, the relief granted by the district court with respect to the Whitman Project.

We need comment only briefly on the form of the relief afforded by the district court in this respect. The district court was modest and conservative in the manner in which it corrected the statutory violation. Having no desire to become Philadelphia's "housing czar," *see* 425 F.

38. The City did advance one justification for its action, arguing that the threat of violence at the Whitman site in the event that construction resumed was sufficient reason to justify action on its part to halt construction of the project. The district court correctly rejected this purported justification, stating with authoritative support that "it is well established that a history of tension or violence does not excuse the violation of civil rights." 425 F. Supp. at 1019; *see also id.* at 1023-24.

Supp. at 1026, the district court required only that the construction of the Whitman project proceed as planned without further interference. In so providing, the district court did not venture outside the permissible boundaries of constitutional and statutory precepts.

We will affirm ¶¶ (1), (2) and (4) of the district court's order as they pertain to these defendants. Paragraph (3) of the district court's order will be discussed separately in Part V of this opinion.[39]

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39. We have not overlooked the argument asserted by PHA that it had improperly been denied a constitutional right to trial by jury. PHA, claiming that Multicon, the developer, had breached the project contract, contends that the severance of its claim against Multicon, and a bench trial of the civil rights claims, denied to PHA its Seventh Amendment right to a jury trial by reason of the collateral estoppel effect of the district court's findings and judgment. We are not unmindful of the right which PHA might otherwise have to a jury determination, *see, e.g.*, Lewis v. Hyland, 554 F. 2d 93, 102-04 (3d Cir. 1977), but we are not persuaded that the essential elements of collateral estoppel have been met. *See* Donegal Steel Foundry Co. v. Accurate Products Co., 516 F. 2d 583, 588 (3d Cir. 1975); Scooper Dooper, Inc. v. Kraftco Corp., 494 F. 2d 840, 844 (3d Cir. 1974). Our review of the record would indicate that PHA's contract claims remain undecided and viable. Hence PHA's Seventh Amendment rights have consequently not been impaired. As Mr. Justice Clark, sitting by designation in the Seventh Circuit, wrote in Moore v. Townsend, 525 F. 2d 482, 486 (7th Cir. 1975), a case also involving a Title VIII claim in analogous procedural circumstances:

> . . . [Mrs. Melnick] insists that the filing of the crossclaims . . . against her . . . entitle[s] her to a jury on the Moore's claim.
>
> . . .
>
> By severing the cross action, the court has preserved the right of Mrs. Melnick to a jury on the issues raised in that action. None of the questions involved in it are raised in the Moore's suit, and none have been determined. It will be soon enough to try Mrs. Townsend's claims for damages against her real estate agents after the liability of Mrs. Townsend is determined. We cannot permit such interstitial squabbles to delay and frustrate the Moores' claim. The Moores asked only for equitable relief, attorney's fees, and costs, and a jury is not available in such cases. *Curtis v. Loether*, 415 U. S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974).

IV.

1. WAIC's primary argument is that its members have been denied equal protection of the laws in that (1) they will be ineligible for ownership of project homes if and when the project is built, and (2) they have expended monies for their present housing without the benefit of any governmental largess. WAIC also argues (3) that the plaintiffs do not have standing; (4) that there has been no compliance with citizen participation requirements; and (5) that no Environmental Impact Statement had been filed respecting the project. The district court found no merit to WAIC's first four arguments, nor do we.

The plaintiffs, in response to the National Environmental Policy Act (NEPA) argument, point out that WAIC at no time before the district court raised or presented proof on this issue. The plaintiffs note that:

> In the numerous pleadings, motions, and memoranda of law filed in this action WAIC has never raised issues regarding NEPA except for one paragraph in their answer to plaintiffs' corrected, second amended supplemental complaint. Docket entry 112. In that instance it was raised as a "defense" to plaintiffs' claim. No affirmative claim or relief was sought against any party, only that "no environmental impact statement has been filed with regard to the project herein involved by RDA, PHA, and/or HUD . . . ."

Brief for Plaintiffs at 164 n. 146. Under these circumstances, and considering the record, we will not now entertain this issue on appeal. *See Newark Morning Ledger Co. v. United States*, 539 F. 2d 929, 932 (3d Cir. 1976) (per Mr. Justice Clark); *Sachanko v. Gill*, 388 F. 2d 859, 861 (3d Cir. 1968).

Despite the rejection of WAIC's appellate contentions however, we are concerned with that portion of the district court's Order of November 5, 1976, which can be read as pertaining to WAIC as well as to the governmental defendants. We find it necessary, therefore, to address briefly the scope of the district court's Order as it may affect WAIC even though WAIC has not taken direct issue with this aspect of the district court's Order.

As previously mentioned, the district court's November 5th Order provided: (1) that the governmental defendants take all necessary steps to construct the project; (2) that PHA submit a racial composition plan for the project; (3) that PHA present a tenanting plan for all public housing projects; and (4) that "all parties to this litigation are enjoined from taking any action which will interfere in any manner with the construction of the Whitman Park Townhouse Project."

It is immediately evident that the first three directives impose no duties on WAIC and require no action by WAIC. However, the fourth segment of the order refers generally to "all parties to this litigation" and enjoins any action which will interfere in any manner with the project construction. WAIC, as previously noted, was permitted status in this proceeding as a defendant-intervenor. As such, WAIC must be considered bound by this provision of the district court's order.

We have serious doubts as to whether the district court even considered WAIC when it framed this portion of its order. As our discussion and a reading of the district court's opinion reveals, the district court was careful to specify those findings and grounds on which it predicated the liability of the governmental defendants. With respect to WAIC, however, the district court's opinion reveals only an equal protection discussion leading to the conclusion that "the evidence does not support a finding that the op-

position to the Whitman Townhouse project by WAIC was substantially racial." 425 F. Supp. at 1024. Where the other defendants were found to have contributed to a racially discriminatory effect, the district court opinion is silent as to WAIC. *See id.* at 1021-25. In the absence of findings that WAIC has committed either statutory or constitutional violations, we are hard-pressed to find any basis for the imposition of an injunction against WAIC. *Cf. Evans v. Buchanan*, 555 F. 2d 373, 389 (3d Cir. 1977) (Garth, J., dissenting) (before grant of injunctive relief can be affirmed, constitutional violations must be identified).

We recognize that WAIC has not specifically attacked this portion, part (4) of the court's order, in its brief.[40] Nevertheless, there can be little question but that the "remedy" afforded to the plaintiffs by the district court runs against WAIC. Nor can there be any question but that WAIC has vigorously opposed the construction of the project. In addition, the breadth and sweep of part (4) of the court's Order[41] as it might affect WAIC's legitimate, constitutionally protected activities has many troubling implications.

While in normal course, we might hesitate to fragment an otherwise integrated Order of the district court without first remanding for findings which may have been inadvertently omitted, as well as for the district court's assessment of its injunction against WAIC, we are confident here that by removing WAIC from the operation of the injunction imposed by part (4) of the Order, we will do no violence to the overall remedy prescribed. First, recogniz-

40. Even in its post-trial motion, brought under F. R. Civ. P. 52(b), WAIC merely listed as its last assignment of error: "The Court erred in its remedy."

41. *See In re* Penn Central Transportation Co., — F. 2d —, No. 76-2542, slip op. at 16-18 (3d Cir. July 25, 1977) (vacating a portion of Reorganization Court Order No. 2569 as "too sweeping.").

ing that the injunction runs against the governmental defendants, we are certain that their respect for, and their obedience to, the mandate of the injunction will permit the court's objective—construction of the Whitman Townhouse project—to be fulfilled. Second, the fact the district court still retains jurisdiction over aspects of this proceeding (*see* note 15 *supra*) assures that, any modification of, or additions or corrections to its Order that may be required in the future, can be readily obtained. Third, and most important, there has been no finding or indication that WAIC would act in such a manner as to interfere illegally with the project.[41a] We are certain that, in the unlikely event that WAIC did improperly interfere with the project, the City of Philadelphia, in discharging its obligations under the district court's order, would take those steps necessary to implement the Order and to permit construction to continue.

Having concluded that, on this record, so much of injunction as it pertains to WAIC cannot be sustained, ¶ (4) of the Order, to the extent that it refers to other than the governmental defendants, will be vacated.

V.

Paragraph (3) of the district court's November 5th Order provides that:

> PHA shall present to this Court within ninety days a plan concerning the tenanting of all public housing projects within the City of Philadelphia which will further racial integration.

41a. As part of a compromise plan, PHA had offered to include Whitman residents in a screening committee to assure that those living in the project would be an asset to the community, 425 F. Supp. at 998. We do not preclude such a joint undertaking when applications for tenancy in the project are under review.

425 F. Supp. at 1029. The plaintiff's complaint, however, does not involve other than the Whitman project. The plaintiff class certified, for example, included only those "who would be eligible to reside in the Whitman Park Townhouse Project." 425 F. Supp. at 993. Plaintiffs' original complaint, and their amended, corrected and supplemental complaints, seek no more than remedies limited to the Whitman project. The pleadings and evidence leave little doubt but that the plaintiffs and the defendants joined issue only with respect to the discrete Whitman project.

While we recognize that the district court admitted evidence concerning other areas of Philadelphia and their characteristics, that evidence was intended to serve not as a basis for restructuring PHA's overall practices but rather as a predicate for the parties' contentions respecting Whitman. At one point, even the plaintiffs acknowledged that they did not seek systemwide relief from PHA, but were concerned only with the failure of the governmental defendants in providing for the Whitman project's construction. *See, e.g.*, N. T. 31-84. It is understandable, therefore, that while evidence extrinsic to Whitman was permitted, it was only the Whitman project on which the dispute focused.

The record, therefore, while it supports relief with respect to Whitman, does not support—nor have the plaintiffs sought [42]—the injunctive order directing PHA to present a tenanting plan furthering racial integration for all public housing projects in Philadelphia.[43]

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42. *See* Lewis v. Hyland, 554 F. 2d 93, 102-04 (3d Cir. 1977) (award of damages vacated where case had been instituted and litigated over a six-year period as an action seeking equitable relief only).

43. In light of our disposition of the district court's award of systemwide relief against PHA, we need not consider the question whether such relief could be sustained under Title VIII.

VI.

Having concluded that the district court did not err in its constitutional findings and its injunctive orders with respect to the City of Philadelphia, and that a statutory basis exists in 42 U. S. C. § 3604(a) to support the district court's injunction with respect to PHA and RDA,[44] we will affirm ¶¶ (1) and (2) of the district court's Order of November 5, 1976, which mandate the construction of the Whitman Park Townhouse project and which require PHA to submit a racial composition plan. Paragraph (3) of the district court's Order, which concerns public housing projects other than the Whitman project, will be vacated for the reasons expressed in Part V of this opinion. For the reasons set forth in Part IV of this opinion, the district court's injunction against WAIC in ¶ (4) of its order will be vacated. Paragraph (4) of the district court's Order of November 5, 1976 will accordingly be modified to read:

> (4) The defendants Philadelphia Housing Authority, Redevelopment Authority for the City of Philadelphia, City of Philadelphia, Department of Housing and Urban Development, their officers, agents, and employees are enjoined from taking any action which will interfere in any manner with the construction of the Whitman Park Townhouse Project.

Thus modified, ¶ (4) will also be affirmed.

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44. The injunction, of course, binds HUD as well. As noted, HUD has not appealed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1241, 77-1242,
77-1243 & 77-1245

RESIDENT ADVISORY BOARD by ROSE WYLIE, Trustee ad litem, 1310 Arch Street

and

HOUSING TASK FORCE OF THE PHILADELPHIA URBAN COALITION by SHIRLEY DENNIS and JOSEPH MILLER, Trustees ad litem, 1512 Walnut Street, Philadelphia, Pennsylvania

and

ESTHER SIERRA MENDEZ, individually and as guardian ad litem for her children, Carmelo, Mariel and Juanita, 1811 North 17th Street, Philadelphia, Pennsylvania

and

JEAN THOMAS, individually and as guardian ad litem for her children, Cheryl, James, Kevin and Byris Thomas, 3855 Mt. Vernon Street, Philadelphia, Pennsylvania

and

MABLE SMITH, individually and as guardian ad litem for her children, Jerome, Vanessa and Janice Smith, 2429 North 27th Street, Philadelphia, Pennsylvania

and

BERNICE DEVINE, individually and on behalf of her children, Robert, Linda and Arthur Devine, Apt. 809-C, Warnock Place, Richard Allen Homes, Philadelphia, Pennsylvania,

on their own behalf and on behalf of all persons on the waiting list for public housing in the City of Philadelphia, Pennsylvania

v.

FRANK RIZZO, individually and in his capacity as Mayor of Philadelphia, City Hall, Philadelphia, Pennsylvania

and

HILLEL LEVINSON, individually and in his capacity as Managing Director of the City of Philadelphia, Municipal Services Building, Philadelphia, Pennsylvania

and

JAMES H. J. TATE, individually

and

FRED T. CORLETO, individually

and

MULTICON CONSTRUCTION CORP.,
4645 Executive Drive, Columbus, Ohio

and

MULTICON PROPERTIES, INC.
4645 Executive Drive, Columbus, Ohio

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA
City Hall Annex, Philadelphia, Pennsylvania,

Defendants

and

WHITMAN AREA IMPROVEMENT COUNCIL, ALICE MOORE, FRED DRUDING, and ALL MEMBERS OF WHITMAN AREA IMPROVEMENT COUNCIL AND ITS OFFICERS, AGENTS, SERVANTS, REPRESENTATIVES and EMPLOYEES, and ALL OTHER PERSONS ACTING IN CONCERT WITH THEM OR OTHERWISE PARTICIPATING IN THEIR AID,

Defendant-Intervenors

and

PHILADELPHIA HOUSING AUTHORITY, 2012 Chestnut Street, Philadelphia, Pennsylvania

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, City Hall Annex, Philadelphia, Pennsylvania

and

RUSSELL BYERS, individually and as Regional Administrator of the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania

and

CARLA A. HILLS, individually and as Secretary of the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania

and

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania,

Third Party Defendants

THE PHILADELPHIA HOUSING AUTHORITY,
Appellant in 77-1241

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,
Appellant in 77-1242

WHITMAN AREA IMPROVEMENT COUNCIL, FRED DRUDING and all others acting in concert therewith,
Appellants in 77-1243

FRANK L. RIZZO, HILLEL S. LEVINSON, the CITY OF PHILADELPHIA, et al.,
Appellants in 77-1245

(D. C. CIVIL No. 71-1575)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WEIS, *Circuit Judge*, CLARK,* *Associate Justice* and GARTH, *Circuit Judge*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 6, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 5, 1976 be, and the same is hereby affirmed with regard to paragraphs (1) and (2),

* The Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States (Retired), sitting by designation, heard the oral argument and participated in the decision in this case but died before the opinion was written.

which mandate the construction of the Whitman Park Townhouse project and which require the Philadelphia Housing Authority to submit a racial composition plan, vacated with regard to paragraph (3), which concerns public housing projects other than the Whitman project and vacated as to the district court's injunction against Whitman Area Improvement Council in paragraph (4). Paragraph (4) is modified to read:

> (4) The defendants Philadelphia Housing Authority, Redevelopment Authority for the City of Philadelphia, City of Philadelphia, Department of Housing and Urban Development, their officers, agents, and employees are enjoined from taking any action which will interfere in any manner with the construction of the Whitman Park Townhouse Project.

Thus modified, paragraph (4) is also affirmed, all in accordance with the opinion of this Court.

ATTEST:

THOMAS P. QUINN

Clerk

August 31, 1977

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1241, 77-1242,
77-1243 & 77-1245

RESIDENT ADVISORY BOARD, etc., et al.

v.

FRANK RIZZO, etc., et al.
THE PHILADELPHIA HOUSING AUTHORITY, et al.,
Appellants

Sur Petition for Rehearing.

Present: WEIS and GARTH, *Circuit Judges*

The petition for panel rehearing filed by RESIDENT ADVISORY BOARD, etc., et al., Appellees in the above entitled case having been submitted to the judges who participated in the panel decision of this court, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the said panel in regular active service not having voted for rehearing, the petition for rehearing is denied.

By the Court,

J. F. WEIS, JR.
Circuit Judge

Dated: September 26, 1977